

CASES
ARGUED AND DETERMINED
IN
THE SUPREME COURT
OF
THE STATE OF MISSOURI,

JANUARY TERM, 1873, AT JEFFERSON CITY, MO.

JOHN P. ELLIS, Respondent, *vs.* HENDERSON JONES, Appellant.

1. *Judgment, law extending lien of—Constitution.*—The legislature has power to pass a law extending the unexpired lien of a judgment from three, to five years.
2. *Judgment—Petition—Names of Parties—Variance—Scire facias.*—Where a petition was brought in behalf of John T. Dowdall, and three other plaintiffs therein named, a judgment thereon in behalf of John T. Dowdall & Co., is not void by reason of the apparent discrepancy. And an execution on a *scire facias* to revive such judgment, issued in the name of "John T. Dowdall," is not void by reason of its variance from the original judgment, particularly where the records of the court showed that no original judgment in behalf of "John T. Dowdall" had been docketed. Neither the original judgment nor the execution in the *scire facias* can be impeached collaterally or by a stranger.

John S. Phelps, for Appellant.

The writ of *scire facias* is a judicial writ; no petition is necessary to base it upon; and it is a continuation of the former suit; 2 Tidd, 1096, 4th American edition; Humphreys *vs.* Lundy 37 Mo., 320; State Treasurer *vs.* Foster, 7 Penn. St.,

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65; Graham's Practice, 661, 663; 8 Bac. Ab., "*scire facias*," 598; Denyre vs. Hann, 13 Iowa, 240.

The judgment rendered in 1860 and entered in the name of Dowdall & Co., is amendable by adding the name of Dowdall's co-plaintiffs as stated in the petition and writ. Judgment may be awarded in affirmance of this by adding names of parties. (W. S. 1034, § 6; also 10th, 13th and 14th clauses § 19 and § 20 W. S. 1036-37.) And our statute of amendments extends to writs of *scire facias*. (1 Tidd P., 713, 4th Amer. Ed.; Brittin vs. Wilder, 6 Hill, 242.)

The question of error or irregularity never can be discussed collaterally in another suit. It is not in issue in this action of ejectment. We are only to look to the judgment and cannot question its regularity. (Jackson vs. Robins, 16 Johns, 537, 575; Jackson vs. Bartlett, 8 Johns., 361; Stark vs. Gildart, 4 How. (Miss.) 267; Van Campen vs. Snyder, 3 How. (Miss.) 66; Winston vs. Affalter, 49 Mo., 263.)

In Durham vs. Heaton, (28 Ills., 264,) the court held, that where by the testimony of the keeper of the record there was no other judgment but the one in question on which the execution issued, though there was a variance in amount and names of parties to the judgment, the identity of the judgment was established. (See page 272.)

Hardin & Ellis, for Respondent.

The judgment could only be revived identically as rendered. (Humphreys vs. Lundy, 37 Mo., 320.) The petition for, and the issuing of, the writ of *scire facias*, are proceedings in the original action, must be to the same cause and between the same parties.

The writ of *scire facias* must pursue the original judgment. (Bacon's Ab. Title, "*scire facias*.")

SHERWOOD, Judge, delivered the opinion of the court.

This was an action of ejectment brought in the Greene Circuit Court by John P. Ellis, against Henderson Jones. At the trial the plaintiff showed a chain of title, for the land in

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controversy, from the United States & mesne conveyance to M. E. Langston, and by said Langston to Harvey H. Neaves by deed dated February 7th, 1859, and from said H. H. Neaves to Thos. G. Neaves by deed dated December 18th, 1860. And the plaintiff to show that he had acquired the title aforesaid, read in evidence a deed made by Elisha Headlee, Pub. Admr. of Greene County, to plaintiff, dated February 18th, 1868, wherein it is recited that said Headlee, as Admr., of the estate of Thos. J. Neaves, deceased, was on the 23d day of August 1867, by the Probate and Common Pleas Court of Greene county, at its August term for that year, "ordered by an entry of record" to "sell under an *alias* order of sale, at public sale, to the highest bidder for cash" the above described land to pay the debts of said estate, that the land was appraised at \$1600 and sold to plaintiff at the sum of \$50; that *This sale* was approved by said court at the next term thereafter, etc., etc.

After the introduction of some testimony as to rents and profits, plaintiff rested.

The defendant then, to show an outstanding title in said land to T. R. Dodson, read in evidence a deed from the sheriff of Greene County to said Dodson, reciting a judgment rendered in the Probate and Common Pleas court aforesaid, on the 4th day of June 1860, in favor of John T. Dowdall, and against Henderson Jones, Iridell Jones and Harvey H. Neaves for \$695.90, the filing of a petition on the 13th day of March 1865, in said court, to revive said judgment, and to continue the lien of the same in force on the following real estate etc., (describing the land in controversy), a judgment dated December the 19th, 1865, in said court, reviving said lien and ordering the lien to be enforced against the land aforesaid, the issuance of an execution on the judgment on the 13th day of February 1866, and the sale of the land in question on the 22d day of May, 1866, to Thos. R. Dodson for \$1,182.34. This deed was filed for record on the 31st of the last mentioned month and year, and duly recorded. Defendant then rested.

The plaintiff then endeavored to show that the judgment revivor aforesaid was void, and that there was no such original

judgment as that of John T. Dowdall against H. Jones, Iredell Jones and Harvey H. Neaves, and introduced in evidence the records of said case as the same appeared on the records of the Probate and Common Pleas Court, and also, the file of pleadings in said cause. The petition therein showed the suit to be brought in the names of John T. Dowdall, James B. Dean, Henry Wiggenbone and Theodore V. Taylor, against Iredell Jones, Henderson Jones and Harvey H. Neaves on a promissory note; and the record showed that defendants filed their answer, entitling the same as above, and subsequent entries in the record show that the cause afterwards proceeds in the name of "John T. Dowdall & Co., and John T. Dowdal *et al.* through all the various continuances, orders, etc., until it finally results in a judgment in favor of John T. Dowdall & Co., against Iredell Jones, Harvey H. Neaves and Henderson Jones" on the same date (the 4th of June 1860,) and for the same amount as specified in the sheriff's deed aforesaid, to Thos. R. Dodson. And the record further shows that at the May term 1865, of the said court, in the case of John T. Dowdall against Henderson Jones, Iredell Jones and Harvey H. Neaves, the writ of *scire facias* previously issued in the cause not having been served on the terre-tenants of Harvey H. Neaves, an *alias* was awarded in the name of John T. Dowdall, against said Jones & Jones and Neaves, reciting the fact of judgment rendered etc., as recited in the Sheriff's deed to Dodson on which defendant relied, and commanding the Sheriff to summon said Jones & Jones and Neaves, and all parties occupying the land in controversy to be and appear, etc. This writ was returned served as to Henderson Jones, and *non est* as to Iredell Jones and Harvey H. Neaves, whereupon an order of publication was made citing them to appear at the November term 1865 of said court, and show cause, etc., or the judgment aforesaid and the lien thereof would be *renewed* and continued in force "against the land aforesaid, and against the other property of said defendants." This publication conforms in all respects as to names, dates, amounts, &c., to the writ of *scire facias* in its various recitals. At the

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November term aforesaid, a judgment of revivor was had conforming in all respects as to names of parties, dates, amount, &c., to the *scire facias* and publication, and reciting the fact of the appearance of Henderson Jones by attorney, and the service on the other defendants by publication, as above stated, and reviving for two years the lien of a judgment in favor of John T. Dowdall and against Henderson Jones, Iredell Jones and Harvey H. Neaves, rendered on the 4th day of June, 1860, and corresponding in all respects to the original judgment, except that the words "& Co." are not affixed to plaintiff's name, and against the land in controversy. This judgment of revivor also recites, that the petition for the issuance of the writ of *scire facias* was filed on the 13th day of March, 1865, and awards execution against the property in question. Among the papers on file in said cause, there is a petition for revivor of said judgment, filed December 9th, 1865, (but whether in vacation or term time does not appear) sworn to before the judge of the court and filed to supply, *nunc pro tunc*, a petition alleged to have been filed in that behalf on the 13th day of March, 1865. The execution awarded in conformity to the judgment of revivor pursues the original judgment, except that the words "& Co." are not annexed to John T. Dowdall's name. And the return on the writ of execution shows that the property in controversy was sold to Dodson, as recited in the Sheriff's deed. The plaintiff then proved that the case of John T. Dowdall vs. H. Jones, I. Jones and H. H. Neaves, was not docketed in the docket of the Probate and Common Pleas Courts at the May and November terms, 1865, and *that no other original judgment* was rendered by said court, in which John T. Dowdall was plaintiff or co-plaintiff, other than the above judgment of John T. Dowdall & Co., plaintiffs vs. H. Jones, I. Jones and H. H. Neaves. This was all the evidence.

The plaintiff then asked the court to declare the law to the effect :

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That where a judgment is rendered for John T. Dowdall & Co., and the petition and process are in favor of John T. Dowdall and three other plaintiffs, who are named, the *judgment is void*.

That all the proceedings to revive the judgment aforesaid were void, &c., &c. The court thus declared the law and defendant excepted.

The defendant then asked declarations of law to the effect: That the proceedings aforesaid were not void; that the title acquired by T. R. Dodson under these proceedings was valid and would defeat plaintiff's action; that if there were any errors or irregularities either in the original judgment or in the proceedings to revive the same, they were not fatal, and could only be taken advantage of in a direct proceeding for that purpose, and could not be made the basis of collateral attack; that if the Probate and Common Pleas Court acquired jurisdiction over the subject matter, and over the persons of defendants, the original judgment was not void; that if the lien of the original judgment, in favor of John T. Dowdall vs. Jones & Jones and Neaves, was kept alive by proceedings duly instituted on the 13th day of March, 1865, by petition filed for that purpose, and due notice of such intended revival given to defendants, and a judgment of revival afterwards entered thereon in conformity to such proceedings, that a sale thereunder would prevail over intermediate incumbrances or conveyances of land, to which the lien of such judgment attached; that the act of the Legislature in relation to judgments and decrees, approved March 17th, 1863, (Sess. Acts 1863, p. 24) was not unconstitutional nor retrospective, but prospective in its operation and operated on all judgments then in force, &c., &c.

The court refused to thus declare the law and defendant again excepted, and judgment going in favor of plaintiff, after an unsuccessful motion for a new trial, defendant brings this case here by appeal.

The original judgment was rendered in the Probate and Common Pleas Court on the 4th day of June, 1860, and the

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lien thereby created continued until June 4th 1863. But the act approved March 17th, 1863, (Sess. Acts 1863, p. 24,) continued the lien of judgments then in force, for five years from the time of their rendition. The effect of this act was to continue the Dowdall judgment until June 4th, 1865, over the property in controversy, if the legislature had the power to enact such a law, and of this I have not the slightest doubt.

The deed of H. H. Neaves to Thos. G. Neaves is dated December 18th, 1860, and consequently the latter purchased the land in question while it was bound by the judgment lien. The court, however, declared that the judgment was *void*, because it was rendered in the name of "John T. Dowdall & Co.," when the petition and summons showed that the suit was brought in the name of John T. Dowdall and these other co-plaintiffs. As a matter of course, if the judgment was void, no lien could result therefrom or be the subject of extension by legislative enactment. That the Probate and Common Pleas Court had acquired jurisdiction in the suit of John T. Dowdall and others against Jones and Neaves, a mere glance at the records and proceedings in that cause will amply suffice to show, and that, where a court of limited jurisdiction once possesses itself of a cause and such fact affirmatively appears, every presumption and liberal intendment which pertains to the acts of courts of general jurisdiction and doings, immediately attaches with equal force to the acts and doings of the inferior tribunal, and where jurisdiction has once been acquired, no subsequent act however irregular or erroneous will divest it, are propositions too plain and well settled to admit of a moments discussion. (Long vs. Burnet, 13 Iowa, 28, II Sm. L. cas. 837 and cas. cit., *Id.* 847 and cas. cit., McNair vs. Biddle, 8 Mo., 257.)

The judgment referred to could have been amended; our statute expressly authorizes amendments to be made in such cases, and this capability of amendment is one of the *cheif* tests of jurisdiction. (Hunt vs. Loucks, 38 Cal., 372; 2 Wag. Stat., 1034, § 6; *Id.*, 1036, § 19; Sherman vs. Frean, 8 Abb. Pr. 33; 18 Ill., 416; 1 Mon., 252.)

The judgment, then, was not void and the court should have refused to so declare.

The Probate and Common Pleas Court, then, being possessed of the cause, steps were taken by Dowdall to revive and continue in force the lien of the judgment rendered in favor of "John T. Dowdall & Co.;" and the only remaining enquiries of material importance presented by this record, are not whether the action of said court in that regard was irregular or erroneous, but whether they were absolutely void; and whether there is a fatal variance between the execution which was awarded by the judgment of revivor, and the original judgment. A *scire facias* to revive a judgment, is a judicial writ; is not a *new* suit, but is a continuation of the original action and merely auxiliary thereto; does not operate to create a new lien, but to continue in force one already in existence; is simply a call or rule upon the debtor to show cause why execution should not issue; and if no cause is shown judgment goes that the plaintiff have execution. The statute of 1855 did not require that a petition should be filed in order to sue out a writ of *scire facias*, but the act approved Feb. 15th, 1865, (Sess Acts, 1865, p. 46,) so amended § 7 (2 R. C, 1855, p. 903) of the old law as to require this to be done.

That such a petition was filed before the issuance of the writ in the case under consideration, is established *prima facie* by the recitals in the Sheriff's deed to Dodson, and conclusively by the judgment of revivor. And the publication which was made subsequently to the filing of the petition, was a substantial compliance with the provisions of the statute, and the court thus had jurisdiction to render the judgment of revivor. Besides, the term at which the defendants were cited to appear by the publication was the time when they should have shown cause; and when they hold their peace, it certainly does not lay in the mouth of a stranger to the record, to complain.

In the case of Wood and Oliver vs. Ellis, (10 Mo., 382.) judgment was rendered against Pemberton by confession on a void warrant of Attorney. Afterwards Pemberton died, and a *scire facias* was sued out against his administrator to revive said

judgment; the administrator failed to appear and judgment of revivor, in consequence of such default, was taken against him.

Subsequently he endeavored to set aside the original judgment because of the defect in the warrant of attorney, and it was held that he was *too late* with his motion, that if the facts were as he claims, he should have appeared and filed his plea of *nul tiel* record; that the judgment might have been set aside on motion *before* its revivor by *scire facias* but could not afterwards he called in question. And the court then cites with approval a case where a plaintiff had obtained a judgment against a defendant, and afterwards released it and then brought *scire facias* on the judgment; and the defendant upon the sheriff's return of *scire facias* failed to appear and judgment was rendered; and it was held that he could not have an *audita querela*, "for he had time to plead the release upon the *scire facias*, and having neglected it the law will not relieve him."

Now if the principles enunciated in these cases are applicable to a judgment originally void, or to a judgment originally valid but subsequently satisfied, would they not be applicable with still greater force to this case where the judgment was simply irregular or erroneous? (See *Waggoner vs. Lessee of Dubois*, 19 Ohio, 67.)

As to the alleged variance between the executions under which the land in controversy was sold, and the original judgment.

- In *Jackson vs. Anderson* (an action of ejectment) 4 Wend., 475, where there was variance between the judgment and execution, the court held that the validity of the execution was not affected by the variance; that it was amendable at any time as well after as before sale. And further, that the *identity* of the judgment with the one on which the execution was sued out was made manifest "by the bill in chancery introduced, and made evidence by the defendant in which the judgment and execution are set forth, and in which it is expressly alleged that the execution was issued on said judgment."

In *Durham vs. Heaton*, 28 Ill., 264, (also an action of eject-

ment) there was as, the court says, "a vast discrepancy" between the amount of the judgment as specified in the execution, and the amount of the judgment actually rendered. And the language of that court is so pertinent to the point in hand that I will use it:

"The defendant however insists that the variance is so great as to compel the inference that it (the execution,) did not issue on the judgment recovered, and that parol proof cannot be received to show its identity. He insists that the records of a court must prove themselves. As a general principle, this is true, but when it is shown to the court by the keeper of the records of a court, that there is no other judgment on those records than the one in question, the proof is as complete as if the records were present to be inspected. The fact is so or it is not so, and this is to be determined by the records, either by inspection or by the sworn testimony of the keeper who has carefully examined and searched them with a view to establish the fact.

Can a party take advantage of this objection, he being a stranger to the proceedings? If it was raised by the debtor himself, a different question would be presented, but even as regards him the execution would not be void. * * * * * The process would stand good until avoided in a proper manner. The defect in it cannot be taken advantage of by any one in a collateral action;—its validity was not affected by the variance; it was amendable at any time, as well after as before the sale. So in *Phillips vs. Coffee*, 17 Ill., 154, this court held that a purchaser at a sheriff's sale, who is not a party to the proceedings, having a good deed, will not be defeated in his title by any defect or irregularity; he relies upon the judgment, levy and deed; all other questions are between the parties to the judgment and the officer. A stranger to the proceedings cannot question them collaterally. (*Swiggart, et al., vs. Harber*, 4 Scam., 364; *Riggs vs. Cook*, 4 Gilm., 336.) Whilst no one is bound by acts done under a void process, those are binding, which are done under erroneous or voidable process, and cannot be successfully

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assailed except by a direct proceeding to set them aside not by "side wind," (see *Hunt vs. Loucks*, 38 Cal., 372, and *cas. cit.*; *Winston vs. Affalter*, 49 Mo., 263; *Swan vs. Saddlemire*, 8 Wend., 676.) Here the plaintiff, a stranger to the record, proved that "*no other original judgment*" was rendered by the Probate and Common Pleas Court in which John T. Dowdall was plaintiff or co-plaintiff, except that of John T. Dowdall & Co. against H. Jones, I. Jones and H. H. Neaves; thus identifying the judgment and bringing this case fully within the rule above stated.

I have carefully examined the record in this cause in the light of the authorities above cited, as well as numerous other analogous decisions, and am confident in the opinion that all the proceedings, both with respect to the original judgment and the means used to revive its lien, were substantially correct, at least, not void, and that Dodson acquired the title to the property in controversy by his purchase of the same, under the execution.

And I am free to confess that in view of the facts and circumstances of this case, I have not been unwillingly led to such conclusion. When a party buys in the land of his neighbor for a mere song, and then endeavors by some technical subtlety to overturn a title acquired for value and in good faith, he should, in order to succeed, be able to unequivocally establish that the law is with him.

With the concurrence of the other judges, the judgment is reversed and the cause remanded, with directions to the court below to proceed in conformity with this opinion.

—O—

JOHN R. THOMPSON, Appellant, vs. THE NORTH MISSOURI RAIL ROAD COMPANY, Respondent.

1. *Damages—Railroads—Negligence—Burden of proof.*—In an action against a railroad company, for personal injuries to plaintiff, the burden is not on plaintiff to aver affirmatively that he was at the time exercising due care, and was himself without negligence, contributing to the injury. Negligence in the plaintiff is a mere defense to be set up by the answer, and shown like any other defense.

Appeal from Randolph County Circuit Court.

R. T. Prewitt, for Appellant.

It is not necessary to allege that the plaintiff had taken *due care*, that is matter of defense. Shearm. & Redf. on Negligence, 46, § 44 and note 2; 2 Chitty Pleadings, 647, *et seq.*, for forms of Declaration.

J. N. Litton, for Respondent.

The burden of proof is on the complainant to prove, that he himself was in the use of ordinary care and without fault at the time, directly contributing to the injury complained of. Warner vs. N. Y. Cent. R. R. Co., 44 N. Y., 470; Curran vs. Warren Co., 36 N. Y., 155; Spencer vs. U. & S. R. R., 5 Barb. N. Y., 338; Wilds vs. H. R. R. R., 24 N. Y., 432; Murphy vs. Deane, 101 Mass., 455; Counter vs. Couch, 8 Allen Mass., 436; Lane vs. Crombie, 12 Pick., 177; Ind. R. R. vs. Keely, 23 Ind., 133; Fox vs. Town of G., 29 Conn., 209; Park vs. O'Brien, 23 Conn., 345; Chamberlin vs. Milwaukie R. R., 7 Wis., 425; Dresler vs. Davis, 7 Wis., 527; Greenleaf vs. R. R., 29 Iowa, 47; C., B. & Q. R. R. vs. Hazzard, 26 Ill., 376; Aurora Br. R. R. vs. Grimes, 13 Ill., 587; 16 Ill., 300, 570; Moore vs. R. R., 4 Zabriskie, 269; Moore vs. Abbott, 32 Maine, 52; Owings vs. Jones, 9 Md., 108; Ficken vs. Jones, 28 Cal., 626; Hyde vs. Jamaica, 27 Vt., 465; Moore vs. Shreveport, 3 La., Ann., 646.

This is no less the law of this state than elsewhere.

Fitch vs. Pacific R. R., 45 Mo., 327; McKeon vs. Citizens' R. R., 43 Mo., 405; Huelsenkamp vs. R. R., 34 Mo., 45; Meyer vs. P. R. R., 43 Mo., 523; Boland vs. R. R. Co., 36 Mo., 484; Smith vs. City of St. Joseph 45, Mo., 451; Shultz vs. P. R. R. Co., 36 Mo., 32; Liddy vs. St. L. R. R., 40 Mo., 506; Meyer vs. P. R. R., 40 Mo., 158; O'Flaherty vs. R. R., 45 Mo., 72.

WAGNER, Judge, delivered the opinion of the court.

In substance, plaintiff alleged in his petition that he was a passenger on the defendant's road, and that in getting off of

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the cars, through the carelessness and negligence of the defendant and its agents, he was injured, for which he asks damages. The Circuit Court sustained a demurrer to the petition, because there was no averment that the plaintiff at the time was exercising due care and was himself without negligence contributing to the injury. The sole question is whether it was necessary to make this allegation, or whether it was matter which properly devolved on the defendant to set up in the answer, and rely upon in defense.

The question as to burden of proof in respect to plaintiff's freedom from negligence, and as to whether he should make the affirmative averment, that he exercised proper care and was free from negligence, is new in this Court, and is involved in uncertainty by the conflicting and evasive decisions of the Courts of other States. While some Courts hold that he must allege and affirmatively establish that he was free from culpable negligence contributing to the injury, others hold that his negligence is matter of defense, of which, the burden of pleading and proving rests upon the defendant.

In my view the latter is the correct doctrine. Negligence on the part of the plaintiff is a mere defense, to be set up in the answer and shown like any other defense, though of course it may be inferred from the circumstances proved by the plaintiff upon the trial. It seems to be illogical and not required by the rules of good pleading, to compel a plaintiff to aver and prove negative matters in cases of this kind. In an ordinary complaint upon negligence, it is not necessary to aver that the plaintiff has taken due care. It is true the action may be defeated by showing that the plaintiff was guilty of such contributory negligence as would preclude a recovery, but that is a question for the jury, to be determined upon the evidence, and not a matter of pleading. I cannot see what possible ground of distinction there can be between the rule forbidding a plaintiff to recover when his negligence has contributed to the injury, and that which prevents a recovery for a fraud or trespass when the parties are *in pari delicto*. Yet it would be difficult to find a case in which it has been held that the plaintiff

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in such actions must assume the burden of showing himself free from fault. (Shearm. & Redf. on Negl. p. 47.)

The petition, I think, stated facts sufficient to require the plaintiff to answer. The judgment should therefore be reversed and the cause remanded.

All the judges concurring.

—o—

MARY GILLIS ROGERS, *et al.*, Respondent, *vs.* MICHAEL DIVELY, Administrator of WILLIAM GILLIS, deceased, Appellant.

1. *Wills—Contests touching, in Circuit Court.—Appointment of temporary administrator.*—In case of proceedings in the Circuit Court under the statute, (W. S. 1368, § 29) to contest the validity of a will, the Probate Court is authorized to suspend the functions of the executor named in the will, and to appoint a temporary administrator *pendente lite*. (See W. S., 72, § 13). The authority of the Probate Court is not confined to contests arising in that tribunal.

Appeal from Jackson Circuit Court.

Hicks, Sheley and Black, for Appellant.

I. Sec. 13, Art. I of the Administration Act relates wholly to cases where the will is first presented for probate, and makes provisions only where the nominated executor for the time being cannot be appointed. This construction gives to the statute its full force and does no violence to its language, as does the construction placed upon it by respondents.

J. Merriman & W. Hough, for Respondents.

I. The object of § 13, Art. 1, of the Act on Executors and Administrators, undoubtedly was, that the will should not be executed while its validity was being contested, and that the property devised should be placed in the hands of some disinterested person, to be preserved for the parties who might appear to be entitled thereto; and the reason for this provision applies with as much force to a contest in the Circuit Court, as to a contest (*if there can be one*) in the Probate Court.

II. No adjudication in the Probate Court of a contest touch-

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ing a will, can prevent another under § 29 of the Act touching Wills (W. S. 1368). The two sections are *pari materia* and must be taken together.

EWING, Judge, delivered the opinion of the Court.

This was a proceeding instituted by the respondents in the Probate Court of Jackson county, at the August term 1870, to revoke the letters testamentary, granted Mary A. Troost as executrix of the last will and testament of William Gillis, deceased, by said Probate Court, and to suspend all her power and authority as executrix under the same, and asking for the appointment of an administrator *pendente lite*. The plaintiff had previously instituted suit in the Circuit Court of Jackson County, to contest the validity of the said will. By the will, said Mary A. Troost was named as executrix and sole devisee, with the exception of a nominal sum bequeathed to the plaintiffs. The will was admitted to probate in November, 1869. The Probate Court, by its order made at the August term, 1870, suspended the letter testamentary granted to said Mary A. Troost, and all her power and authority under and by virtue of the same, during the time of such contest; and granted letters of administration to Michael Dively, with an order that he take charge of the property belonging to said estate, and administer the same during such contest. From this order the defendant took an appeal to the Circuit Court of Jackson County, where after a hearing of the cause, a similar order and decree to that of the Probate Court were made, suspending the letters and all power and authority by virtue thereof, during the time of the contest of said will. A motion for a new trial having been overruled the cause is brought here by appeal.

Mary A. Troost having died since the transcript was filed in the court, the suit was renewed in the name of Michael Dively, who had been appointed administrator *de bonis non* with the will annexed of the said Gillis.

It is maintained for the appellant that the order of the Probate Court in suspending the letters testamentary of Mary A. Troost and her authority under them, was unauthorized by

law, and it is claimed that the only case in which such a power can be exercised by the Probate Court is, where the will is presented in that court for proof in the common form, that it is only when there is a *contest* concerning the will in *that court*, that any authority exists to suspend the functions of the executor named in the will, and appoint a temporary administrator. This view is manifestly erroneous, and such a construction would so restrict the operation of the law as to render it almost, if not quite nugatory. The 13th sec., art. 1 of the administration law provides, that if the validity of a will be contested, or the executor be a minor or absent from the State, letters of administration shall be granted during the time of such contest, minority or absence, to some other person, who shall take charge of the property and administer the same according to law under the direction of the court; and account for and pay and deliver all the money and property of the estate to the executor or regular administrator when qualified to act. (1 W. S. 72). The statute concerning wills provides, that if any person interested in the probate of any will shall appear within five years after the probate or rejection thereof, and by petition to the Circuit Court of the County contest the validity of the will, or pray to have a will proved which has been rejected, an issue shall be made, etc. (§ 29, 2 W. S., 1368). These provisions have been the law of this State since 1825, and being in *pari materia* should be construed together as parts of different statutes relating to the same subject matter, and having the same object. When thus viewed, the meaning of the section of the administration law above quoted becomes obvious.

In the proceeding to set aside or establish a will in the Circuit Court, all persons interested in the estate of the deceased, must be made parties either as plaintiffs or defendants. This is always necessary when the will is presented for proof in the solemn form. On the contrary when the will is produced for probate in the common form, no notice or citation to the parties in interest to appear is required by law, or necessary. If it be conceded however, that persons interest-

State to use of Major, et al., v. Jackson, et al.

ed in the estate may appear, and contest in the Probate Court the validity of a will, or the sufficiency of the proof on which it is proposed to admit it to probate, yet if the act be so construed as to limit the authority of the Probate Court to the appointment of a temporary administrator, pending such proceedings only, the manifest object of the act would be but partially attained, if not wholly defeated. The result of such a construction would be, that in cases where the will is either admitted to probate without opposition or contest as in the case at bar, or rejected and proceedings are subsequently instituted in the Circuit court to contest its validity, or to have it proved, which may continue for years before a final adjudication is had, the power of the Probate Court in this respect, would be exhausted, at a point where it is most important that it should begin and be called into exercise. The act invests the special administrator with such large powers in the management of the estate, as clearly to imply that the litigation concerning the will would be likely to cause much delay, which might result in detriment to the estate and those interested therein, if no provisions were made for its administration and control in the mean time, by some other than the executor, whose authority depended upon the result of such litigation. It is evident therefore to my mind that the law was enacted in view mainly, if not solely, of the proceeding which is authorized by the statute concerning wills above quoted.

The judgment of the Circuit Court is affirmed.

—o—

STATE to use of S. C. MAJOR, *et al.*, Respondent, *vs.* Prior M. JACKSON, *et al.*, Appellant.

1. *Deed of Trust—Sheriff appointed trustee—Action against, on his bond.* Under § 1 of the statute of 1855, touching trusts and trustees, (R. C. 1855, p. 1554.) an action will not lie against a sheriff on his official bond for moneys collected by him under a deed of trust, acting in the place of a deceased trustee, where the appointment was made on the affidavit of the maker of the deed. Under a proper construction of that statute, the person making the affidavit should be the creditor, or some person who has an interest in the collection or coercion of the debt.

State to use of Major, et al., v. Jackson.

Appeal from the Howard Circuit Court.

E. B. Adams, for Appellant.

I. The statute only authorizes the court to act on the suggestion and upon the affidavit of a person interested in the debt or liability secured by the deed of trust. That is to say, the person who makes the affidavit applying for the appointment of the sheriff, must have an interest in the debt or liability secured by the deed of trust, and it cannot be done by the debtor himself who has no such interest, and has no right whatever to initiate such proceedings for the foreclosure of the mortgage.

Prewitt, for Respondent.

I. The motion in arrest of judgment should be overruled. Viley, the surviving partner, was a party interested and had a right to file the affidavit asking for the appointment of the sheriff. (Gen. Stat. 1865, 154, § 1.)

II. The object of the statute is to have a trustee in existence, who may proceed to close the trust when required by the proper parties. The statute does not say the parties to whom the debt or liability is due, but any party interested may have the trustee appointed.

III. The sheriff having received the money sued for upon the sale made by him under said appointment, cannot question the right of parties for whose benefit the sale was made, to demand and receive the same, nor can his surities. (State to use of *Pepler vs. John Sholl*, 47 Mo., 84; *Mississippi County vs. Jackson*, *ante*, 23; *Story on Agency*, § 217.)

WAGNER, Judge, delivered the opinion of the court.

The material and controlling question in this case is brought up by the motion in arrest of judgment. The suit was instituted on the official bond of the defendant Jackson, as Sheriff, to recover from him and his sureties certain moneys, which it is alleged came into his hands, arising from a sale of lands made by him under a Deed of Trust.

The allegation in the petition is, that John Viley executed

a Deed of Trust to one Fray as Trustee, to secure the payment of debts therein specified to Fray and others; and that Fray died without carrying out the provisions of the trust. That Viley, who made and executed the trust deed, filed his affidavit asking the court to appoint the sheriff to act instead of the trustee, and enforce the provisions of the said deed of trust. That the appointment was accordingly made, and that the sheriff proceeded to sell the land, and that he received on the sale the money which is here sued for, which he neglected and failed to pay over.

In the Circuit Court, judgment was rendered against the defendants. Whether they are responsible, depends upon the validity of the appointment of the sheriff to act as Trustee.

The proceeding is governed by the revised Code of 1855, and the law then in force declares "If any Trustee in a Deed of Trust, to secure the payment of a debt or other liability, shall die or become insane, or remove from the State, without having completed the performance of the duties imposed upon him by the Deed of Trust, any person interested in the debt or other liability secured by such Deed of Trust, may prepare his affidavit, stating the facts of the case specifically, and present the same to the Circuit Court of the County in which the property or estate conveyed by such Deed of Trust, or a part thereof, may be situated." (2 Rev. Code. 1855, p. 1554, § 1.)

The next succeeding section makes it the duty of the court, if it is satisfied that the facts stated in the affidavit are true, to make an order appointing the Sheriff of the County, Trustee to execute the trust.

It will be observed that the law requires, that the affidavit should be made by some person interested in the debt or liability.

The unmistakable meaning of this is, that it should be the creditor or some person who has an interest in the collection or the coercion of payment from the debtor. It was never contemplated that the affidavit or application for the appointment of the sheriff to act as trustee, and execute the provisions of the trust, should be made by the debtor, the maker of the deed.

Silvey v. Sumner.

Such a construction would lead to great mischief, and be productive of injustice. In case of the death, absence or disability of the trustee, the debtor might watch his opportunity, and obtain an appointment and have the land sold and bid it in for his benefit, or sacrificed, when there would be no one apprised of the fact, or present to protect the interest of the creditor. The whole proceeding and sale are in the nature of a foreclosure of the equity of redemption, and surely a mortgagor cannot foreclose a mortgage against himself without consulting the mortgagee. Nor can a debtor bring suit against himself in favor of his creditor. Yet in effect that very thing was done in this case. Viley being the debtor, and the person who executed the Deed of Trust, was incompetent to file the affidavit and have the Sheriff appointed as Trustee. He had no authority for the proceeding, and the consequence is, that the appointment and the sale thereunder is void. No deed has yet been made to the purchasers. And the deed would convey no title, as there was no authority to sell. Having arrived at this conclusion, it is unnecessary to discuss the question of the statute of limitations, which was raised in the case.

The judgment must be reversed. The other Judges concur, except Judge Adams who did not sit.

—o—

MARY A. SILVEY, Plaintiff in Error, *vs.* ALPHONSO SUMNER,
Defendant in Error.

Practice, civil—Supreme Court—Judgment—Writ of Error.—Where the record shows no judgment of the court below, a writ of error will be dismissed.

Error to Morgan Circuit Court.

J. A. Spurlock, for Plaintiff in Error.

A. W. Anthony, for Defendant in Error.

EWING, Judge, delivered the opinion of the court.

No judgment of the Circuit Court appears in the record.

The writ of error is therefore dismissed.

The other Judges concur.

 Ells v. Pacific R. R.

WM. M. ELLS and CLEMENCE ELLS, his wife, Respondents, *vs.*
PACIFIC RAILROAD, Appellant.

1. *Railroad, Osage Valley—Condemnation—Refusal of owner to relinquish land.*—In proceedings to condemn land for the "Osage Valley & Southern Kansas Railroad Company" under the act of 1857, (Sess. acts 1857, pp. 59, 63,) no title to the land will pass unless it appear affirmatively from the record that the owner refused to relinquish his right of way to the company.
2. *Ejectment—Equitable defence—Part performance—Averments, etc.*—In ejectment, when the defence sets up a parol contract for the sale of the land to a third party, followed by a change of possession and the making of improvements on the premises, but fails to state that the possession was taken and that the improvements were made in good faith and solely under the belief that the parol contract would be specifically performed, the equity is not sufficiently stated to make the defense good.
3. *Equity—Relief—Evidence.*—Evidence in order to warrant a court of equity in affording relief, must be clear and forcible, and positive and definite.

Appeal from Cooper Circuit Court.

Hayden & Tompkins, for Respondents.

The judgment of condemnation in this case is void, and may be attacked collaterally. See the following authorities: (Boswell's Lessees *vs.* Otis, 9 Howard, 336; same case, 18 Curtis, S. C., 168; Harris *vs.* Hardeman *et al.*, 14 Howard, 334 and authorities cited; same case, 20 Curtis, U. S., 206; Fithian *vs.* Monks, 43 Mo. Rep., 520, 521, 522 and the numerous authorities cited; 44 Mo., 540; City of Boonville *vs.* Omrod's adm., 26 Mo., 193; Cooley on Const. Lim., p. 17, notes and authorities cited; Dillon on Municipal Corporations, §§ 468, 469, 470 and notes, and § 471; Janney *vs.* Spedden, 38 Mo., 395; 49 Mo., 361; *id.* 155.)

SHERWOOD, Judge, delivered the opinion of the Court.

This is an action of ejectment brought in the Cooper Circuit Court, by Ells and wife against the Pacific Railroad, to recover possession of the south part of Lot 167 in the city of Boonville.

Both parties claim under James H. Lucas as the common source of title.

The answer of defendant, after a plea of the general issue,

sets up an alleged equitable-defense, to the effect that the whole of lot 167 had been purchased of James H. Lucas and Anne L. Hunt, for \$500 by the Osage Valley & Southern Kansas Railroad Company, during the pending of proceedings on the part of said Company, as early as September, 1868, to have said lot condemned for a depot, and that under such purchase and with the knowledge of Ells the plaintiff, who is charged in the answer to have been the agent of Lucas and Hunt in making the contract, the O. V. & S. K. R. R. Co., took possession of said lot and erected valuable and lasting improvements, etc.; that defendant is the lessee of said O. V. & S. K. Co.; that Lucas was notified in writing of these proceedings to condemn, that the purchase money had been offered to Ells, the agent, but neither Lucas nor Ells had made or caused to be made, a deed for said lot.

There was a reply to this answer which denied its chief allegations, but failed to deny however, that Lucas was notified in writing, of the proceedings to condemn, or that the purchase money was offered to be paid.

Upon the trial of the cause by the court, the defendant, in order to support the plea of the general issue, read in evidence the judgment of condemnation of the whole of lot 167, in favor of the O. V. & S. K. Railroad Co. and against James H. Lucas. That judgment (which is without date, but purports to have been rendered by the Cooper Circuit Court,) is in these words:

“Osage Valley and Southern Kansas Railroad Company,
against
James H. Lucas.

Now at this day this case coming on to be heard, the same is submitted to the court on the petition of plaintiffs, and proofs, and the court being satisfied that notice of this proceeding was duly served on said defendant, and that the commissioners appointed for that purpose have discharged their duty according to law, in viewing the lot through which the railroad of plaintiff passes, and that said commissioners have filed their report and plat, in the office of the clerk of this

Court, and no valid objection appearing to said report, the same is now here approved, and judgment is hereby rendered against said company, and in favor of said defendant, James H. Lucas, for the amount of damage, and the value of said lot assessed therein in said report, viz.; five hundred dollars, and all costs of the proceeding, and an order and decree is now here made and rendered by this Court, vesting in said company and their successors and assigns forever, the fee simple title of the lot in said plat and report described as follows: viz., lot 167 fronting 90 feet on Morgan St. and 150 feet along Second St., and is situated north of Morgan Street in the city of Boonville, County of Cooper, and through and over which said Railroad passes; and which said title shall vest as aforesaid upon the payment of the said five hundred dollars to the said James H. Lucas."

The act incorporating the Osage Valley & Southern Kansas Railroad Company is found in the Session Acts of 1857, pp. 59 to 63 inclusive. Sections 9 and 10 of that act, point out the mode to be pursued for the condemnation of land. Section 9 provides, "If any owner of any tract of land, through which said railroad shall pass, shall refuse to relinquish the right of way for said road to said company, or the necessary lands for depots, engine or warehouses, water stations, stopping stations or turn outs, * * * the facts of the case shall be specifically stated to the Judge of the Circuit Court of the County in which such lands are situated, and said Judge shall appoint three disinterested citizens of the county in which such lands are situated to view said lands, who shall take into consideration the value of the land and advantages and dis-advantages of the road to the same, and shall report under oath, what damages will be done the said lands or any improvements thereon, stating the amount of damages assessed, and shall return a plat of the land thus condemned; notice of such application to such judge shall be given to the owner of such lands, five days before such application shall be made, if such owner reside in this State," etc., etc., etc.

Section 10 provides: "The persons appointed to view

and value such lands shall file their report and plat in the office of the Clerk of the Circuit Court of the county in which the land or a part thereof is situated, and if no valid objection be made to said report, the court shall render verdict in favor of said owner and against such company for the amount of damages assessed, and shall make an order vesting in said company the fee simple title of the land in such plat and report described. Objections to such report must be filed within ten days after the same shall be filed," etc., etc.

It requires but a very cursory examination of this judgment, in connection with the provisions of the act above referred to, to see that several of the vitally essential requirements of the latter were utterly ignored if not willfully disregarded, in the proceeding to condemn the lot in question. In this statutory and summary proceedings; this legal *coup de main*; in derogation of common law and common right, the utmost strictness is required in order to give validity; and unless upon the *face of the proceeding* had, it *affirmatively appear* that every essential pre-requisite of the statute conferring the authority has been fully complied with, every step from inception to termination will be *coram non judice*.

Under the statute above mentioned, the refusal of the owner to relinquish is a jurisdictional fact; in the absence of which, even a court of general jurisdiction would be powerless by judgment of condemnation, to wrest property from its owner.

And authorities are not wanting either in point of numbers or respectability, which hold that *quoad* these summary proceedings, courts of general jurisdiction stand upon the same footing as those tribunals whose jurisdiction is special and limited. It follows as an inevitable sequence from these premises, that the judgment of condemnation was utterly worthless and could be of no avail as a matter of defense. See *Lind vs. Clemens*, 44 Mo., 540; *Leslie vs. The City of St. Louis, Id.*, 479; *Reitenbangh vs. Chester Val. R. R. Co.*, 21 Penn. St., 100.

In this view of the subject it becomes entirely unnecessary

to examine into the correctness of the action of the court below, either in giving or refusing declarations of law, or in the admission of testimony.

As to the assessment of damages for the detention of the premises sued for, we see nothing in the record to warrant the belief that the court committed any error.

It only remains to consider the alleged equitable defense set up in defendant's answer : and of this it may be observed, that nothing therein contained would authorize a decree for specific performance ; the rule being, that where an equity based upon part performance is set up as a defense, it must be done with that degree of fullness and precision required in a bill framed with a view to a decree for a specific performance. This the answer signally failed to do. It fails to state that possession was taken of the lot in question, and improvements made thereon, in *good faith*, and *solely* under the belief and expectation that the parol contract would be specifically performed ; but on the contrary, the idea of reliance, in part at least, upon the proceedings to condemn, pervades the whole answer, else what need to state that proceedings for that purpose were instituted, or that Lucas was notified in writing, etc.?

But even had the answer been in all respects formally sufficient, still the evidence would not have been of a character so *clear* and *forcible*, and in its nature so *positive* and *definite* as to warrant a court of equity in affording relief. (1 Sto. Eq., §§ 762, 763, 764, 770.)

The judgment of the court below is therefore affirmed.

Bauer v. Franklin County.

JACOB BAUER, Appellant, *vs.* FRANKLIN COUNTY, Respondent.

1. *Practice, civil—Evidence—Objections—No reason stated—Effect of.*—Where no specific reasons are given at the time, showing why evidence is inadmissible, the objections will not be considered by this court.
2. *County warrants—County court cannot discount.*—A County court has no power to discount its warrants in payment of a county debt. Chapter 52 of the Statutes of 1865 concerning public roads (Gen. Stat. 1865, p. 290,) gives no such power. The statute invests the county court with the authority, when the county is a party, to audit, adjust and settle all accounts, and to order the payment out of the county treasury of any sum of money found due by the county; and the only means they can resort to upon such adjustment, is to order the clerk to issue a warrant; when this is done, their power is extinct, and they have no right to give an additional sum to raise the warrants to a cash standard.

Appeal from Franklin County Circuit Court.

Henry Flanagan with James Halligan, for Appellant.

It is submitted that in issuing warrants to the plaintiff to make up his loss, the county court did not abuse its discretion. The contract was not to be discharged in warrants, but in cash, and as the treasurer was entirely unable to meet the demands of the county court, it was competent for that body to raise money in the manner they did, under the power conferred by chapter 52, Gen. Stat. of 1865, and the Act of March 21st, 1868, (Sess., Acts 1868, page 42.) The exercise of discretionary power by county courts, may be unwise and extravagant, yet the circuit court cannot control them. (Hooper vs. Ely, 46 Mo., 505.) Under the Act of 1868, it was competent for the county court to sell the warrants at a discount. That act did not limit the court to the par value of their warrants or bonds. (Meyers vs. The City of Muscatine, 1 Wallace, 385.) The act (1868) has been passed upon by this court in the case of Steines vs. Franklin Co., 48 Mo., 167.

If the county court had the power to borrow money, it had the power to discount its warrants as a means of raising money, as a necessary, implied power, for "what is implied has the same effect as what is expressed." (U. S. vs. Babbit, 1, Black, 55; Shoemaker vs. Goshen Township, 14 Ohio St., 569.)

Seay & Kiskaddon, for Respondents.

The mode in which the county court pays the debts of the county, is prescribed by the statute, and must be followed. If the treasurer fails to pay the warrant issued in pursuance of that mode, the holder of the warrant has a remedy by bringing action upon it. A county warrant is in effect the promissory note of the county, and it is made negotiable by statute. When negotiated the right of action passes from the assignor to the assignee. The county court has no authority to pay money from the treasury without the intervention of a warrant, or to issue warrants to make up a loss on other warrants sold by the payees thereof, for less than par. (Wag. Stat. 415, §§ 31, 35; Phelps Co. vs. Bishop, 46 Mo. 68; Hooper vs. Ely, 46 Mo., 505; State *ex rel* West vs. Clark County, 41 Mo., 44; Thompson vs. Kellogg, 23 Mo., 281; Barrett vs. Schuyler Co., Court, 44 Mo., 197; Flagg vs. Mayor, etc., of Palmyra, 33 Mo., 440; Kingsbury vs. Pettis County, 48 Mo., 207; Han., St. Jo. R. R. Co., vs. Marion County, 36 Mo., 294; 10 Wallace 676; Clark vs. Des Moines, Iowa, reported in 6 Am. Law Reg. N. S., 146; Fairchild vs. O., G. & R. R. Co., 15, N. Y., 337. A warrant on the treasurer of a R. R. corporation, is in effect a promissory note, and may be declared on as such; People vs. Draper, 15 N. Y., 570, 572; Clark vs. Polk County, 19 Iowa, 248; Young vs. Camden County, 19 Mo., 309; Zimmerman vs. Bollinger County Court, 48 Mo., 475.)

WAGNER, Judge, delivered the opinion of the court.

The objections, made on the argument of this cause, to the action of the court in admitting testimony, cannot be noticed here. All the objections made by both parties at the trial were general in their nature; no specific reasons were given why the evidence was inadmissible, and where such is the case, the objections will not be considered in this court.

The real question underlying the whole case, is the power of a County court, in fulfillment of a contract, to discount county warrants so as to make them equivalent to cash.

The plaintiff entered into a contract with the county to grade and macadamize a certain road, for which he was to receive the sum of \$45,756.29 in cash, or its equivalent.

A certain proportionate part was to be paid as the work progressed, and the balance in a certain specified time after its completion. It appears from the record, that cash was paid up to the time specified in the contract for completing the work, and the County court informed the plaintiff that they could obtain no more money, and that they could only pay in county warrants, and desired him to give up the contract; but this he refused to do, and went on with the work receiving warrants from time to time.

Though he did not waive his right to insist on cash payments, he received in payments \$29,039.97 in cash, and \$12-594.83 in county warrants. These warrants were at 30 per cent. discount.

Plaintiff then presented his claim to the County Court for the balance due him, including therein, the sum of \$3,778.45, being the amount of discount on the warrants he had received.

The court refused to allow this item, and on a settlement, issued to him warrants for the balance found due. He presented these warrants to the Treasurer of the county for payment, who endorsed thereon that there was no money in the treasury, and then he left them with that officer and presented his demand against the county, for the amount of the warrants, as also for the amount which he claimed he had lost by reason of discounts as above stated.

The County Court refused the allowance of the claim and their judgment was affirmed in the Circuit Court.

I know of no law in this State, which would authorize a County Court to discount its warrants, in payment of a county debt.

The 52d chapter of the General Statutes, which was in force when this contract was entered into, is cited to support this power. But it must be seen at a glance, that it has no application to this case, and is utterly opposed to the doctrine contended for.

The second section gives the County Court power to improve roads by grading, macadamizing, etc. The 7th section provides, that the County Court shall have power and authority for the purposes specified in the second section, to borrow money on the credit of the county, and issue the bonds of the county with coupons attached; but said bonds shall not be of a denomination of less than one hundred, nor more than one thousand dollars, and shall not run exceeding twenty years, nor bear interest at a higher rate than six per cent., nor shall said bonds or any of them be sold or disposed of at less than their par value; that is to say, the amount called for on their face.

In the present case, the County Court did not attempt to proceed in accordance with the statute. No bonds were issued, and if they had been, they could not have drawn more than six per cent., and could only have been negotiable for their par value.

Had they proceeded under the statute, or had the statute imposed no limitation on the amount for which the bonds should be sold, we apprehend that no court of justice would sanction the exorbitant discount of thirty per cent. Such a waste of the people's money for making a county road, would be intolerable.

Admit that the County Court may at their discretion, sell the county credit for whatever price they please, and the most flagrant abuses would follow. But the statute gives them no such power in the payment of the county indebtedness. It invests them with authority when the county is a party, to audit, adjust and settle all accounts, and to order the payment out of the County Treasury of any sum of money found due by the county; and the only means they can resort to upon such adjustment or settlement is to order their clerk to issue a warrant. (1 Wag. Stat., 414, 415, §§ 28, 31.) When this is done their power is extinct, and they have no right to give an additional sum to raise the warrants to a cash standard.

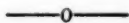
The County Court in making contracts is the agent of the county, with express limited and defined powers, and any one contracting with it, must take notice of its authority.

King v. Fink.

It is therefore obvious that the plaintiff in this case, cannot recover the difference between the face of the warrants, and the amount at which they were selling when he received them.

This necessarily leads to an affirmance of the judgment. But the court at the end of the judgment appended an order that the last warrants issued to the plaintiff, and to which he was entitled as being the last payment, should remain in the care and custody of the Clerk of the County Court. We do not understand this to be intended as a denial of the plaintiffs right to them ; but only as a means of keeping them safely till the plaintiff called for them. They are without doubt the property of the plaintiff, and should be delivered up to him on demand.

Judgment affirmed ; all the Judges concurring.



ROBERT A. KING, Respondent, *vs.* GEORGE FINK, Appellant.

1. *Deeds—Ambiguities latent—Attempt to incorporate new words when deed is intelligible.*—One Terry owned certain land in E. half N. E., quarter sec 36, etc. The land conveyed by him, was described on the deed as in S. W. quarter, sec 36, etc., where in fact he owned no land. In ejectment for the land, *Held*, that it was incompetent to show by parol testimony that the deed was designed to transfer a tract in S. W. quarter "of Terry's land," in sec. 36, etc. This is not a case of latent ambiguity which may be explained by parol evidence ; but it is an attempt, where the description contained in the deed was plain and intelligible, to introduce new words into it in order to show an intention not apparent on its face.

Appeal from the Franklin County Circuit Court.

John R. Martin, for Appellant.

A sheriff's deed to the purchaser of land sold under execution, must contain a description of the land sold. (1 W. S., 612, § 54.) The description must be identical with that contained in the levy and advertisement. Particularly is this required, where a sheriff executes a deed for a predecessor in officer, under the statute.

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Henry Flanagan, for Respondent.

The deeds offered in evidence were competent. (Nelson vs. Brodhack, 44 Mo., 596; Brown vs. Brown, 45 Mo., 412; Shultz vs. Lindell, 40 Mo., 330; Webster vs. Blount, 39 Mo., 500; Gibson vs. Bogy, 28 Mo., 478; Parks vs. Watson, 29 Mo., 108.)

And it is well settled in this State, that parol evidence is admissible to indentify the premises described in a sheriff's deed, however indefinite the description might be. (Hart vs. Rec-tor, 7 Mo., 531; Landes vs. Perkins, 12 Mo., 238; Bates vs. Bank of Missouri, 15 Mo., 309; Webster vs. Blount, 39 Mo., 500.)

EWING, Judge, delivered the opinion of the court.

This is an action of ejectment. The answer is a general denial. The petition describes the land thus: Four acres in the south-west corner of section 36, Township 43, Range 2, west, being the same land conveyed to the defendant by B. D. Terry and wife, and where the defendant resides.

The plaintiff to sustain his title read in evidence an entry from the tract book of the original entries of lands in Franklin county, in which the land is described as the east half of the north-east quarter of the section, township and range above stated, also a deed from Terry and Wife to the defendant, bearing date March 5, 1856; a deed from the sheriff of Frank-lin county dated April 6th, 1869 to C. B. Fallenstein and Chas. W. Gauss, and from Fallenstein & Gauss bearing date Oct. 22d, 1859, to Jas. Halligan; and a deed from Halligan to the plaintiff, bearing date May 1st, 1868. The county surveyor, a witness introduced by plaintiff, testified to the effect that the deeds of Terry to Fink, of Fallenstein and Gauss to Halligan, and of Halligan to plaintiff; did not describe the land acquired by Fink from Terry, and of which he was in possession; that Terry owned no land in the south-west quarter of section 36, that he, witness, had surveyed the land occupied by the defen-dant, which he claimed to have purchased from Terry, and that it was not the land described in said deeds, or in the petition;

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that it was only by adding certain words to the description, that it could be made to apply to the land on which the defendant lived, and which he purchased from Terry. This evidence was objected to by the defendant and its admission excepted to. Plaintiff then by leave of the court amended his petition by inserting the words "of B. D. Terry's land," to which defendant excepted. Defendant then read in evidence the execution in favor of C. B. Fallenstein and C. W. Gauss against the defendant, issued in 1857, and the sheriff's return. This was all the evidence. The court sitting as a jury found the issues for plaintiff and gave judgment accordingly. The deed of the sheriff to Fallenstein and Gauss should have been excluded. This instrument describes somewhat indefinitely a parcel of land situated in the north-east quarter, instead of the south-west quarter of section 36, designating it as four acres in the south-west corner of B. D. Terry's land in that section 36. The land owned by Terry, as plaintiff himself had shown, was the east half of the north-east quarter of the section, and it was a part of this tract that Terry had conveyed to the defendant, Fink. The land which, as appears by the return of the sheriff, was levied on and sold by him to Fallenstein and Gauss, was four acres in the south-west corner of section 36, township 43, range 2; a different parcel of land from that described in the sheriff's deed.

The other conveyances read in evidence, described the land intelligibly and with certainty as four acres in the south-west corner of section 36, township 43, range 2, referring to it as the land sold to Fink by Terry, and by the sheriff to Fallenstein and Gauss.

Plaintiff maintains that the intention was to convey land in the north-east quarter and not in the south-west quarter, and sought to prove this by evidence, showing that neither Terry nor the defendant owned any land in the last named part of the section, but in another part of it, to which the description in the deeds did not apply. Rejecting the words of reference following the description in these deeds as *falsu demonstratio*, enough remains to convey the premises therein described, as being in the south-west quarter, and the instruments will take

effect, because a sufficient description remains, to ascertain its application. It is not admissible to reject a description which is definite and certain in a deed, and incorporate other premises by a different description. (*Hart vs. Rector*, 7 Mo., 531.)

This is not a case where the description in the deeds apply to two distinct tracts or parcels of land, thus constituting a latent ambiguity which may be explained by parol evidence.

It is admissible in all cases in which a difficulty arises in applying the words of the instrument to the subject matter, to remove the ambiguity which is introduced by the admission of *extrinsic* evidence, by the introduction of further evidence on the same subject, calculated to explain the intent. 1 Greenl. Ev., § 297; 8 Bing., 244. But a new subject matter cannot be imported by parol evidence into the instrument itself. The plaintiff does not endeavor to apply the description *contained in the deeds* to land owned by Terry in the north-east quarter of the section, or to land in possession of the defendant; but in order to make out an intention not apparent on the face of the deeds, the party is compelled to introduce new words and a different description into the body of the deeds themselves. This is manifestly not merely calling in the aid of extrinsic evidence, to apply the description and intention as collected from the deeds themselves, but it is invoking such evidence to incorporate an intention not apparent on their face.

It is not simply removing a difficulty arising from a defective description; it is making the deeds speak in reference to a matter on which they are altogether silent. I am of opinion therefore, that the court erred in admitting the evidence of the surveyor.

The judgment of the Circuit Court is reversed, and the cause remanded. The other Judges concur.

—o—

SARAH C. GOODE, *et. al.*, Defendant in Error, *vs.* JOHN T. CROW, *et. al.*, Plaintiff in Error.

1. *Partition Sale—Motion to set aside—Affidavit, etc.*—In proceeding on motion to set aside the sale of land in partition, the Circuit Court must be allowed to

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exercise a sound discretion in regard to the sort of proofs to be used. And where they adopt the practice of allowing affidavits to be read *pro.* and *con.*, the Supreme Court will not interfere.

2. *Partition Sale—Reports as to time of sale—Motion to set aside sale, etc.*—Where bidders were kept away from a partition sale by rumors that the land would not be sold till the day following, and by reason thereof the land sold at greatly reduced rates, *Seemle* that the sale ought to be set aside; and it is no matter how the reports got into circulation; whether by the agency of the purchasers or otherwise.
3. *Partition Sale—Minor heirs not brought in court—Sale set aside, etc.*—A partition sale may be set aside, where it appears that a portion of the minor heirs were not properly brought before the court.

Error to the Franklin Circuit Court.

Seay, for Appellant, cited in argument *Stewart vs. Severance*, 43 Mo., 322; 1 Story's Eq. Jur., §§ 197, 199, 200 *a*; 3 Mo., 477; Story's Eq., § 197; 26 Mo., 398, 415; *Lefevre vs. Laraway*, 22 Barb., 171, 172.

Henry Flannagan, for Defendant in Error, cited *Wooton vs. Hinkle*, 20 Mo., 290; *Blight's heirs vs. Tobin*, 7 T. B. Monroe, 612; *Mills vs. Rogers*, 2 Little's (Ky.), 217; *Phipps vs. Stickney*, 3 Met., (Mass.), 384; *Doolin vs. Marl*, 6 Johnson's, 194.

ADAMS, Judge, delivered the opinion of the court.

This was a partition case in which a sale was made of the lands, and a motion filed by plaintiff to set aside the sale was resisted by the purchasers. The court upon the trial of the motion, set aside the sale, and the purchasers have brought the proceedings on the motion here by writ of error.

The record proper has not been brought up, but only the proceedings on the motion are before us. It appears from these proceedings, that the plaintiffs allege in their motion to set aside the sale, that many persons were prevented from attending the sale by reason of rumors in the country, that the sale would not take place on the day that it had been set for, but on the next day. And the motion charges the purchasers with putting these rumors in circulation, so as to purchase the lands at a reduced price; that bidders were kept away by these

rumors, and that the purchasers obtained the lands at ten times less than their value.

The motion also charges that several parties to the partition were infants, and were not properly before the court. That one of the defendants owning an interest in the land, was not properly notified, so as to be bound by the judgment. The court heard the motion on affidavit. The purchasers objected to the affidavits offered by plaintiffs, upon the alleged ground that they were taken by surprise by these affidavits not having been filed; but no motion was made when they were offered to postpone the case to another day in term or to the next term, and the purchasers then produced affidavits on their part.

The affidavits read by the plaintiffs tended to show the state of facts alleged in the motion in regard to the sale having been put off, etc., and the affidavits on the part of the purchasers conduced to show that they had not given circulation to the alleged rumors, but had tried to correct them.

There is no statute or other law governing the trials of such motions. They are summary proceedings, and the Circuit Court must be allowed to exercise a sound discretion in regard to the sort of proofs to be adduced upon the trial. Some of these courts have adopted the practice of allowing affidavits to be read, and we see no good reason to interfere with their discretion in this respect.

If the purchasers had applied for a postponement of the motion to another day or till the next term if necessary, in order to procure proof, a refusal to grant the request might have warranted an interference by this court, but no such application was made and the question does not arise.

In regard to the merits of this controversy, it may be remarked that in judicial sales it is the duty of the court to protect the interests of all parties. Where the sale is under execution, the interests of the creditor and debtor as well as purchaser must be looked after, and where the sale is in partition, all parties to the proceedings as well as the purchasers are entitled to the protection of the court.

In the case under consideration, it appears that rumors were

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afloat in the country that the sale would not take place on the 12th, but on the 13th of the month, and that by such rumors, bidders were prevented from attending the sale. If bidders were kept away by these rumors, it is of no consequence how they got into circulation, whether by the act of the purchasers or otherwise.

It seems that the property was purchased at a greatly reduced rate, and the presumption is, that those rumors caused the sacrifice. Besides, some of these parties are infants, and the motion alleges that they are not properly in court, and also, that one of the defendants was not properly notified.

If this be true, it is of itself good ground for setting aside the sale. The purchasers no doubt, could have had the sale set aside on this ground, as they purchased with the understanding that the whole title passed, and if they could set it aside for this reason, the plaintiffs ought also to be allowed the like privilege. How the record really is in regard to these parties, we cannot decide as it is not before us. The presumption is, that the decision of the Circuit Court is right, and the party objecting to it, must show to the contrary. It was the duty of the purchasers to see that the full record was brought here, as in its absence, we must infer what is necessary in order to sustain the judgment on the motion.

For these reasons, I think the judgment of the Circuit Court ought to be affirmed. Judgment affirmed. The other Judges concur.

—O—

FELIX JEFFRIES, Respondent, *vs.* W. R. WRIGHT, *et al.*, Appellant.

1. *Justice of Peace—Transcript—May embrace several judgments.*—A justice of the Peace in certifying transcripts from his docket, may embrace several judgments in one certificate, and it will not be necessary to certify each judgment separately.
2. *Judgment of Justice—Appeal—Parol proof as to summons, etc.*—The judgment of a Justice of the Peace cannot be attacked on appeal therefrom to the Circuit Court, by parol testimony, in contradiction of the Constable's return showing that he had never served summons upon defendant. Even the judg-

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ments of courts having inferior jurisdiction are not obnoxious to collateral attacks, when the facts necessary to confer jurisdiction appear affirmatively on the face of the proceedings.

Scire facias—*Sheriff's return*—*Pleadings, etc.*—In proceedings in *scire facias* to revive a judgment, defendant cannot plead anything contrary to the sheriff's return; nor anything else which he might have pleaded in the original suit.

Appeal from Miller County Circuit Court.

Geo. T. White, for Appellant.

The judgment is on its face void, as the transcript does not show that the service was made in time to give the justice jurisdiction. (*Sanders vs. Rains*, 10 Mo., 770 to 773.) Jurisdiction will not be presumed as to inferior courts, (*Bersch vs. Schneider*, 27 Mo., 101.)

The Circuit Court erred in not permitting us to show that we had not been served with process. (*Van Rensselaer vs. Ogden*, 7 How. Pr., 297; *Wallis vs. Lott*, 15 How. Pr., 567; *Black's case*, 4 Abbott, 162.) The rule that will not call in question the return of the Sheriff or Constable, applies only where the return is very regular on its face. (*Stewart vs. Stringer* 41 Mo., 407.)

The transcript should show on its face that the justice had jurisdiction. He is confined strictly to the county, and this must appear by record, which is wanting in this case. (*State vs. Metzger*, 26 Mo., 66; *Walker vs. Turner*, 9 Wheat., 549; *Powers vs. People*, 4. John., 292; *Thomas vs. Tanner*, 14 How. Pr., 426.)

E. L. King & Bro., for Respondent.

There was no material irregularity in the proceedings had before the justice, and if there had been, it appearing that the justice had jurisdiction of the subject matter and that the appellants had actual notice of the proceedings, the irregularities if any, cannot be inquired into in this proceeding; hence we insist that the Circuit Court committed no error in reviving the judgment of the justice. (*McNair vs. Biddle* 8 Mo., 257; *Perryman vs. Relfe*, Admr., 8 Mo., 208; *Higgins vs. Peetzer*, 49 Mo., 152; *Martin vs. McLean*, 49 Mo., 361.)

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The certificate of the Justice, to the transcript, is sufficient, (8 Mo., 208.)

SHERWOOD, Judge, delivered the opinion of the court.

This was a proceeding instituted in the Circuit Court of Miller County, by Felix Jeffries to revive by *scire facias* the lien of a judgment obtained by him before a Justice of the Peace, against W. R. Wright and others; a transcript of which judgment had been filed in the office of the Clerk of the Circuit Court of that county.

The defendant filed an answer in the nature of a plea of *nul tiel record*, denying that plaintiff had recovered judgment against them or either of them, and stating that the justice had no jurisdiction over the subject matter, or over either of the defendants, at the time said judgment was alleged to have been rendered; that the judgment was a nullity and was obtained without giving defendants or either of them an opportunity to be heard, etc., and denying that said judgment or the filing of a transcript of the same became a lien. etc. Upon the trial, the plaintiffs offered to read in evidence the transcript of the judgment, which was in this form:

Felix Jeffries vs. W. R. Wright, John Cross, Bluford Barton & John Williams: Justice's Fees.

Four Summons, 25c; Swearing two witnesses, 10c; Judgment, 35c; Subpoena, 22c; Execution, 25c; Constable's fees, serving four Subpoenas, \$1.00; Two Subpoenas, 50c; Witnesses, James M. Smith, 50c; W. H. Smith, 50c. Filed Nov., 15th 1862, an account for the use of sorrel mare one year, \$90.00.

Summons issued, returnable the 8th day Dec., 1862.

Summons returned as served on the 8th Dec. law day, plaintiff appeared in person. Defendants made default; after hearing allegation it is considered plaintiff have judgment, for \$50, and costs of suit. Execution issued the 2d day of Jan., 1863, returnable in sixty days. Returned no property.

Certificate on other page.

E. L. SHORT, J. P.

STATE OF MISSOURI, }
County of Miller. }

I, E. L. Short, an acting Justice of the Peace, of Richwood

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Township in Miller County, certify the foregoing are true and complete transcripts, of the docket entries in the two foregoing cases, had before me.

Given under my hand, this the 10th day of March, 1863.

E. L. SHORT, J. P.

Defendants objected to this transcript being read in evidence and assigned as grounds of such objection :

That it did not appear from the face of said transcript, that defendant had been properly served in Miller County within the proper time, that the Justice waited three hours for defendant, or that he heard any proofs, and rendered judgment for so much as the testimony showed he was entitled to, and that there was no proper certificate of the justice to the transcript.

These objections being overruled, and the transcript read, defendants excepted. "Plaintiff rested his case."

Defendants then offered to show by parol evidence that the Constable never served the summons upon them, which was alleged to have been served in the transcript.

This the court refused to permit them to do, and they again excepted. The Court then gave judgment reviving the lien of the judgment.

Defendants then, after moving unsuccessfully for a new trial and in arrest, bring the case here by appeal.

Section 53, p. 598, 1 Wag. Stat., provides: "Copies of proceedings before Justice of the Peace, certified by the justice before whom the proceedings are had, shall be evidence of such proceedings, or by him in whose lawful custody they are."

"And § 15, 2d, Id., p. 839, provides:

"No judgment rendered by a Justice of the Peace shall be stayed, or in any way affected by reason of any informality in entering such judgments, or other entry required to be made in the docket, or for any other default or negligence of the justice or constable, by which neither party shall have been prejudiced."

It will be thus seen that these transcripts are made evidence

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by law, and also that the Legislature (by wise forethought and timely precaution) has made provision against the probable blunders and inaccuracies of these inferior tribunals which adjudicate upon matters of lesser litigation.

But the transcript in this case is well enough, and although not punctuated, indicates with sufficient clearness that the justice had acquired jurisdiction, and proceeded in due course of law to judgment.

It would be indeed a grievous hardship if a plaintiff's rights could be defeated, merely because the justice who tries the cause was not conversant with the rules of punctuation. And no valid objection can be urged to the manner in which the justice has certified this transcript.

In *Perryman vs. The State*, 8 Mo., 208, the court holds that a Justice of the Peace in certifying transcripts from his docket, may embrace several judgments in one certificate, and it will not be necessary to certify each judgment separately.

The court ruled correctly in not permitting defendants to prove by parol that the constable had never served the summons upon them. It is not permitted to thus collaterally attack even the judgment of a justice of the peace.

In *Putnam vs. Man*, 3 Wend., 202, it was held that a person who was a constable might serve a summons *in his own favor* issued by a justice of the peace, and that his return could not be impeached in action of trespass for an arrest under an execution, issued on a judgment rendered on the return of such summons.

That if the return was false the remedy was by action for *a false return*.

That the return was conclusive against the defendant in the cause in which it was made.

In like manner in *Wheeler vs. Lampman*, 14 John., 481, it was held that the return of a constable is not traversible.

In *Hallowell vs. Page*, 24 Mo., 590, this court held that the return of a Sheriff regular on its face was conclusive, and could only be impeached in a collateral action for its falsity: that to "permit the parties to an action to controvert the truth

of the return of the officer, deputed by law to serve process, would produce great delay and embarrassment in the administration of justice."

It is not perceived why the same reasoning would not with equal cogency apply to the return of a Constable. He too "is an officer deputed by law to serve process;" and the suits which would ensue upon a contradiction of his returns, would parallel in degree though not in result the impeachment of those of a Sheriff.

The precise point in question has never been passed upon by this Court, although in *Montgomery vs. Failey, et al.*, 5 Mo., 223, where an action of ejectment was based on the transcript of a judgment of a Justice of the Peace, on which an execution had been issued out of the office of the Clerk of the Circuit Court, in which said transcript had been filed; and on the trial of the ejectment the defendant offered to prove, in order to invalidate the judgment obtained before the justice, that at the time suit was commenced, he did not reside in the township of St. Louis in which the justice resided and in which the judgment was rendered against him; this court in affirming the judgment of the Circuit Court, held that the record of a judgment offered in evidence in another suit, could not be invalidated by matter *in pais*. The parties in that case and in the one before the justice were the same; and the judgment rendered by the latter *showed jurisdiction on its face*.

It is true that the defendant in that case did not attempt to contradict the return of the officer, but he attempted to reach the same result which would have followed such contradictions; *i. e.* the overthrow of the judgment of the justice for want of jurisdiction.

The cases of *Caldwell vs. Lockridge*, 9 Mo., 362; *The State to use of Collins vs. Stephenson, et al.*, 12 Mo. 178; *State vs. Metzger*, 26 Mo., 65; *Bersch vs. Schneider*, 27 Mo., 101; were all cases where judgments were rendered by courts of inferior jurisdiction, (County Courts and Justice's Courts) and the fact of jurisdiction having been acquired was negatived in the

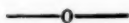
most positive and emphatic manner by the very face of the proceedings; and in those cases this court held that such judgments could be attacked collaterally. So then, I gather from these authorities of our own State, that even the judgments of inferior courts are not obnoxious to collateral attack, when the facts necessary to confer jurisdiction appear affirmatively upon the face of the proceedings in question. Let such a state of facts be thus disclosed, and the judgments of these inferior tribunals stand upon the same footing of unquestionable verity, as do judgments of courts of general jurisdiction.

In the proceeding by *scire facias* to revive a judgment, the defendant may plead *nul teil record*, (2 Tidd., 1129,) but this plea goes only to the existence of the record (1 Tidd., 651,) and the issue of *nul tiel record* is triable by the record itself, if of the same court, or by the tenor of the record, if of another court, (Tidd., 743, 3 Salk., 321.)

But it is an invariable rule that in proceedings by *scire facias* the defendant cannot plead anything contrary to the sheriff's return; (2 Salk., 601), nor can he plead anything which he might have pleaded in the original action; (2 Tidd., 1130.) If a defendant in this kind of proceeding could not plead anything contradictory to the Sheriff's return, *a fortiori* he would not be permitted to prove it.

And if a defendant is inhibited from pleading anything to the *scire facias* which he might have pleaded to the original action, most certainly he should not be permitted to establish by testimony that which he is precluded from pleading.

Let the judgment be affirmed. The other Judges concur.



WILLIAM DUKE, *et al.*, Plaintiff in Error, *vs.* CHARLES BRANDT,
Defendant in Error.

1. *Dower—Action for—Possession of deceased husband—Seizin, etc.*—In suit for dower, evidence that the deceased husband of the claimant possessed the lands, claiming them as his own, and left his family there at the time of his death is sufficient to make out a *prima facie* case of seizin in the husband.

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2. *Dower—Contract for purchase of land—Possession—Seizin—Vendor's lien, etc.*—Certain school lands were sold by order of the County Court; the purchaser giving his note to the county for the purchase money and receiving the usual certificate of purchase. (Wag. Stat., 868, § 7.) A. bought the land from the original purchaser, lifted the note and substituted his own. He died in possession, leaving the whole of the note still unpaid. At administrator's sale, B. purchased the land and paid the amount of a judgment obtained on the note of A. Held, that B. might be subrogated to the rights of the county, and enforce the vendor's lien against the land. But that the title thereto would remain in the heirs of A., subject to be defeated by sale under the vendor's lien; but that aside from such divestiture, there was in A., an equitable seizin, such as would entitle his widow upon payment out of his assets of the amount of the note, to her dower in the land, under § 1 of the dower act. And this right of dower would still remain notwithstanding the fact that no money had been paid by the deceased husband to the county, and no sale had been made by the county to him as contemplated by §§ 2, 3, of said act.

Error to Morgan Circuit Court.

Spurlock, for Plaintiff in Error.

Draffin & Stover, and Neilson, for Defendant in Error.

By virtue of the administrator's deed, Brandt acquired Thruston's inchoate title to the land, and nothing remained for him to do in order to perfect the title in himself, but to discharge the county's lien on the lands for the purchase money; and having done so he takes the land free from any claim for dower.

If a considerable portion of the purchase money had been paid by Thruston in his lifetime, then his widow would be entitled to have her dower in the land assigned; subject however to her proper contribution towards the payment of the balance of the unpaid purchase money: But in this case, no part of the purchase money was paid, and dower does not attach. (Hart vs. Logan, 49 Mo., 47.)

The land was sold away from the estate of L. C. Thruston, by his administrator by order of the Probate Court, for the payment of debts, and this purchaser having paid off the entire lien for the whole of the original purchase money, takes the whole fee simple title to the land clear from dower. (Worsham vs. Callison, 49 Mo., 206).

The county might have enforced a sale of this land under a special execution, to compel the payment of the purchase money; and the purchaser at such sale would take the title to the land free from any claim to dower by L. C. Thruston's widow. (W. St., § 3, p. 538.)

ADAMS, Judge, delivered the opinion of the court.

This record is in such confusion, that it is difficult to extract a satisfactory statement of what was done in the Circuit Court.

The facts, however, seem to be about as follows: Lafayette C. Thruston was the husband of plaintiff, Nancy E. Duke, and died intestate in 1863 or 1864, and his widow Nancy intermarried with the plaintiff, Wm. Duke.

This is an action for dower, in which the plaintiffs claim that Thruston died seized of the following real estate in Morgan county, to-wit: The north half of the north-west quarter of section 16, township 42, of range 19, and the north-west quarter of the north-west quarter, and the north-east quarter of the north-east quarter, and south-east quarter of north-west quarter of section 8, township and range aforesaid; and the petition alleges that the plaintiff Nancy, as widow of said Thruston, deceased, is entitled to dower in the same, and that the defendant is in possession of said lands, and the petition prays that dower be allotted and adjudged to her.

The answer, in substance, denies the plaintiffs' right to dower, and sets up a purchase of the same at administrator's sale, &c.

Upon the trial, the plaintiffs offered evidence, conducing to show that the said Thruston entered into the army in 1862 left his family residing on these lands, and died. He had lived on the lands as his own before his enlistment.

The lands in section 16, he bought of one Berry, and took a general warranty deed in fee simple, which was offered to be read in evidence. He took deeds from other parties for the lands in section 8.

When he bought the lands in section 16 of Berry, he paid part cash and the balance, about \$136.00, he paid by lifting a

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note which Berry had given to Morgan county, for the purchase money at a sale of these lands as school lands, and executing his own note to the county for the same. This note stood against him at the time of his death, and was probated against his estate.

This was, in substance, the evidence offered by plaintiff, all of which was excluded upon the alleged ground, that the plaintiff had shown no such seizin in Thruston as entitled the plaintiff Nancy, to dower.

The defendant claimed the lands by virtue of a sale and deed made by the administrator of Thruston for payment of debts. But this sale and deed only comprehended one of the eighty acres tracts in section 8, and none of the land in section 16 in which dower is claimed. The defendant also proved that after the administrator's sale, he paid off Thruston's note to the county, or rather the judgment which had been rendered on it. He was threatened with a suit to foreclose the vendor's lien, and paid it off to save costs.

The case was submitted to the court, and a judgment given against the plaintiffs. The usual motions in arrest, and for a new trial were made and overruled. I am unable to perceive upon what ground the court excluded the plaintiff's evidence. The evidence clearly tended to show that Thruston died seized in fee of the lands in section 8. Possession of lands claiming them as his own, is evidence of title in the possessor, and if it be conceded that Thruston was in possession of the lands in section 8, claiming them as his own, and left his family there, and they were there at the time of his death, this was a sufficient *prima facie* case to entitle his widow to dower. The sale of the lands in section 8 by the administrator for payments of debts, could not divest the widow's dower.

In regard to the lands in section 16, it seems that they were not included in the sale and deed made by the administrator to the defendant. He alleges that there was a mistake in the order of sale and also in the sale and deed; that these lands were intended to be sold, but by a mistake, another part of section 16 was actually sold and contained in the administra-

tor's deed, but that he took possession of the land in dispute under that purchase.

Whether this alleged mistake can be corrected at all or not, it is very evident that it cannot be done on the pleadings as they stand in this case.

The payment of the purchase money due to the county, did not invest any title in the defendant. If he paid it, believing that he was the owner by administrator's sale, he may be subrogated to the rights of the county, and enforce their vendor's lien against the lands. The lands still belong to the heirs of Thruston, subject to this lien, and the only question remaining is, whether Thruston had such a seizin as to entitle his wife to dower. It may be assumed that Thruston, by his deed from Berry, only succeeded to Berry's rights in these lands. He was in possession under a contract to purchase with the right to pay the purchase money, and procure the legal estate in fee. His right rested in contract and possession. This he might have transferred or relinquished at any time before his death, and thus defeated his wife's inchoate right of dower. (See *Worsham vs. Callison, et al.*, 49 Mo., 206.)

But he died in possession, and this right to complete his title, was in equity real estate and descended to his heirs, vesting in them the right to pay off the debt and acquire the legal title. It was such an interest in lands, as might have been sold under execution during his life-time, and such a sale or a sale by himself might have transferred this interest free of dower. As the husband died in possession, was not this such an equitable seizin as entitled the widow to dower under the first section of our statute concerning dower? This case is governed by the dower act of 1855, but there is no material difference in this respect between the laws of 1855, and our present statutes. Section 2, R. C. of 1855, page 668, provides that where a contract was made for lands, and the purchase money in whole or in part was not paid; but after the death of the husband is paid out of the assets of the estate, his widow shall be endowed of the third part of such lands.

This section was intended to place such lands on the foot-

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ing, after the payment of the purchase money, as other unincumbered real estate.

Section three provides that where only part of the purchase money has been paid, and the lands are sold under the orders or judgment of a court, or by virtue of any power in such contract, or of any power or devise in the will of the husband, the widow shall be endowed as against every person, except such as may hold a lien on such real estate for the payment of the purchase money, and those claiming under them. This section refers to cases where parts of the purchase money had been paid, and allows the widow to be endowed against all purchasers of the land after the death of the husband, subject, however, to be defeated by a sale under the vendor's lien.

It will be observed that sections two and three do not touch the case at bar; no part of the purchase money had been paid before or after the death of the husband, nor has there been any sale of the lands.

That a sale under the vendor's lien would defeat the widow's dower, is too plain to need illustration. But, subject to the vendor's lien for the purchase money, is not the widow entitled to dower when no part of the purchase money was paid before the husband's death?

There is nothing in our statute denying dower in this sort of case, and in my judgment, it is comprehended in the first section of the statute, subject, of course, to be defeated by the enforcement of the vendor's lien, (*Hart vs. Logan*, 49 Mo., 47; *Jones vs. Bragg*, 33 Mo., 337)

Under this view, the judgment must be reversed, and the cause remanded.

The other judges concur.

Major, Adm., v. Bukley and Peacher.

SAMUEL C. MAJOR, Administrator of JOHN E. LISLE deceased,
Appellant, *vs.* CHARLES BUKLEY and WILLIAM PEACHER,
Respondents.

1. *Vendor's lien—Notice, what constitutes.*—A purchaser who at the time of sale is in possession of facts, which would put an ordinarily prudent man upon inquiry, as to the existence of a vendor's lien upon the property purchased, will be held to take subject to the lien.
2. *Vendor's lien—Security—Waiver—Estoppel.*—The recital in a conveyance of land that "The balance of the purchase money, to-wit: \$1,680 is secured to be paid" is not a waiver of the lien of the vendor, nor does it estop him from asserting it.
3. *Deeds—Habendum—No essential part of.*—The *habendum* clause is no essential part of a deed. It may be entirely rejected if repugnant to the other clauses of the conveyance.

Appeal from Howard County Circuit Court.

Prewitt & Major, for Appellant.

I. The declaration in the deed of Lisle, that part of the purchase money was paid and the balance secured to be paid, was a notice to Peacher of the vendor's lien, and retained the same against him and every other person claiming through that deed. (*Johnson vs. Gwathmey*, 4 Lit. Ky., 317; *Thornton vs. Knox*, 6 B. Munr., 74.)

II. In order to discharge the lien, there must be some collateral security over and above the obligation of the purchase. (*American note to Macbeth vs. Symmons*, 1 W. & T. Lead. Cas. 364; *Adams vs. Buchanan*, 49 Mo., 64; *Delassus vs. Poston*, 19 Mo., 425; *Sugd. on Vend.*, 880, note 2.)

III. The vendor's lien does not arise from contract but is given by law. It exists although an absolute deed has been made with full covenants, and although the deed acknowledges full payment of the purchase money, or a receipt of the purchase money be indorsed on the deed, if in fact it has not been paid. (*Am. note to Macbeth vs. Symmons. Ubi supra.*) And if the purchaser from the vendee have notice of the fact he is bound by the lien.

IV. If the covenant of warranty in this deed against the claims of the vendor and all others could have the effect to discharge the lien, then very few vendors in this State would have

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a lien, for nearly every deed has a covenant of warranty or at least contains the words "grant, bargain and sell," which import that the land is free from incumbrance done or suffered by the grantor. (1 W. S., 274, §8.)

Edwards & Son with Herndon, Attys. for Respondent.

It is a well settled principle of law in this State, that where the vendor of real estate takes collateral security for the purchase money of real estate, or any part thereof, he thereby waives his vendor's lien on said real estate. (*Durette vs. Briggs*, 47 Mo., 356, and authorities cited.)

The recital of said deed from Lisle to Bukley "That the balance of said purchase money, to wit: one thousand six hundred and eighty dollars, is secured to be paid," is a waiver of the vendor's lien, and the plaintiff is estopped thereby from denying that any part of said purchase money was unpaid, and said words act as an estoppel against the plaintiff. (*Durette vs. Briggs*, 47 Mo., 360.)

The grantor in a deed is considered as having acknowledged under seal and in writing, the existence of the matters which he recites, and he is estopped from denying so solemn an admission. (Same case, p. 361.)

Recitals in a deed are binding on all claiming under the deed. (*Douglas vs. Scott*, 5 Ohio, 194; S. C. 7 Ohio, 227.) By the same rule the party making the admissions should be bound by such admissions.

Lisle by express covenant, conveyed the land to the Bukleys "free from the claim of him, the said John E. Lisle." This is an express waiver of his lien as vendor, and he is estopped by his warranty against himself from setting up his lien as vendor.

Peacher in his answer, denies all knowledge of the non-payment of any part of the purchase money. It is admitted in the record that there is no evidence tending to show that he had such notice, apart from the implied notice in the deed from Lisle to the Bukleys, and unless the deed imparts notice there is no lien.

Although there might have been positive proof that Peacher knew that the purchase money had not been paid, this fact would give the plaintiff no right to recover against Peacher. Lisle waived his right to look to the land for payment of the purchase money. First, by stating in his deed that "The balance of the purchase money was secured to be paid." Second. By conveying the land "free from all claim of himself." Lisle is estopped from claiming a lien on the land as vendor, for this claim is expressly in the teeth of his warranty as against himself.

SHERWOOD, Judge, delivered the opinion of the court.

The facts in this case as disclosed by the record are these :

John E. Lisle on the 17th day of October, 1867, by his deed of that date, conveyed to Charles Bukley and Anna, his wife, certain lands in Howard county, Missouri. This deed, which was duly acknowledged on the same day, and filed for record on the 5th of the following November, recites "that the said John E. Lisle, party hereto of the first part, for and in consideration of the sum of two thousand two hundred and forty dollars; five hundred and sixty dollars part thereof cash in hand paid by the said Charles Bukley and Anna his wife, the receipt whereof is hereby acknowledged; the balance of the said purchase money to-wit: One thousand six hundred and eighty dollars is secured to be paid, he the said John E. Lisle hath sold and by this deed does hereby grant, bargain, sell alien, release and convey unto them, the said Charles Bukley and Anna, his wife, the following described lands, &c., &c., and concludes with a *habendum* clause, in the words :

"To have and to hold said lands, with all and singular, the appurtenances thereto attached and belonging unto them the said Charles Bukley and Anna Bukley his wife, free from the claim of him, the said John E. Lisle, and also free from the claim or claims of all and every person whatsoever."

Lisle afterwards died; Samuel C. Major became the administrator of his estate, and the residue of the purchase money, eleven hundred and twenty dollars, being due and unpaid,

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said Administrator brought his suit in the Circuit Court of Howard County against Charles Bukley and William J. Peacher, (the latter having purchased the land from Bukley and wife) to enforce the vendor's lien for the unpaid purchase money.

The petition after reciting the facts above set forth, charges that Peacher, with full knowledge that the balance of the purchase money had not been paid, bought the land from Bukley and wife and received a conveyance from them therefor.

Bukley failing to appear, judgment was taken against him by default.

Peacher appeared and filed his separate answer, denying that he purchased with knowledge that the purchase money or any part of it remained unpaid, and claiming that the deed above referred to, dated October 17th, 1867, from Lisle to Bukley and wife, by its terms, released the lands therein conveyed from any lien for unpaid purchase money so that Bukley and wife could sell and convey the same; that the land having been thus released, was not bound for any portion of the purchase money, that it could not be sold for this purpose, as the deed showed that said purchase money was "secured to be paid."

The defendant filed a replication, denying all the material allegations of defendant, Peacher's answer.

The cause was tried by the court and the deed from Lisle to Buckley and wife, as well as the deed from the latter to Peacher, dated November 5th, 1867, and acknowledged and recorded on the 28th of the same month, were read in evidence. Testimony was also introduced showing that the purchase money as claimed in plaintiff's petition, was due and unpaid; that no collateral security of any kind had ever been given, and that no one had informed Peacher of the non-payment of the purchase money until after he had purchased and paid for the land. This was all the evidence. Thereupon the court found for the defendant, and that Peacher had no notice that any part of the purchase money due to Lisle by Bukley and wife was unpaid, and that, therefore, the plaintiff had no vendor's lien on the land as against Peacher, and refused to en-

force the same, and judgment was entered in conformity to such finding; to which plaintiff excepted and filed his motion to set aside this finding, and for a new trial, alleging as grounds therefor:

That the finding was against the law and against the facts, and that the deed created a vendors' lien on the land and was notice thereof to the purchaser. This motion being overruled, plaintiff again excepted and brings this case here by appeal.

The court which tried this case seems to have been entirely at a loss as to the doctrine respecting vendors' liens, and the manner in which those liens affect subsequent purchasers.

Because "*no one had informed Peacher*" of the fact that the purchase money was unpaid, and because he did not happen to have actual knowledge of it, the court finds that "he had no notice."

It is a maxim of universal recognition in equity jurisprudence "that he who takes with notice of an equity, takes subject to that equity."

Notice, in this connection, does not mean positive information brought directly home to the party sought to be charged therewith, and affected thereby; but any fact that would put an ordinarily prudent man upon inquiry is notice.

The authorities on this subject are unbroken in their uniformity. But in this case we are not driven to any nice discrimination between circumstances which would and those which would not put a man of ordinary prudence on the alert, for the vendor Lisle, *by the very terms of his deed* to Bukley and wife, has made *public* and *constant* assertion of his lien and claim for the payment of his debt.

But it is urged on the behalf of the respondents that the words "the balance of the said purchase money to-wit: one thousand, six hundred and eighty dollars is secured to be paid," which Lisle employed in that deed to both proclaim and protect his rights instead of having the effect desired, will overthrow and destroy the very interests they were intended to subserve.

Such a position as this is clearly untenable and has not the

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sanction of either reason or authority in its support. If such a doctrine as this should prevail, vendors' liens would soon become plants of delicate and exotic growth.

In *Johnston vs. Gwathmey*, 4 Litt., 318, this language is used:

"In the case now under consideration, the conveyance from Gabriel J. Johnston to Gwathmey, was executed on the 17th September, 1817, and recites the consideration in the following words:

"For and in consideration of the sum of \$2,500 secured to be paid by him, the said Gwathmey, at the following periods to-wit: \$400 on the 3d day of March, 1818; \$400 on the 3d day of June next, 1818; \$400 on the 3d day of September next, 1818; \$650 on the 3d day of September, 1819, and \$650 on the 3d day of September, 1820, the receipt of which security is hereby acknowledged." On the 11th day of December, 1818, not two months after the execution of the conveyance, Gwathmey sold and conveyed the lot to Campbell. That conveyance recites the consideration as paid, and further declares that it is the same lot that was conveyed to the said John Gwathmey by Gabriel Jones Johnson and Elizabeth his wife, by indenture and deed, bearing date the 17th day of September, 1817," which *prima facie* amounts to express notice." The court, in that case, scouts the idea that the words "secured" and "security" meant personal security, which removed the lien.

It is further urged on the part of the respondent, that the *habendum* clause in the deed from Lisle to Bukley and wife, is an express waiver of lien and Lisle is estopped thereby.

This position we regard equally as untenable as the first. The *habendum* is no essential part of the deed. It merely denotes the extent of the estate granted; in modern conveyancing it is almost practically obsolete, and may be entirely rejected if repugnant to the other clauses of the conveyance.

Numerous authorities might be cited in full accord with *Johnston vs. Gwathmey*, *supra*, and there is nothing in the authorities cited by counsel for respondent, which at all militates against the views here expressed.

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For these reasons the Circuit Court clearly erred in refusing upon the evidence to find that Peacher was a purchaser with notice, and its judgment is therefore reversed and the cause remanded.

Judge Adams not sitting. The other Judges concur.

—o—

WILLIAM H. MOORE, Trustee, Respondent, *vs.* SAMUEL C. DAVIS, Appellant.

1. *Practice, civil—Evidence, weight of, etc.*—In civil law cases where there is a conflict of evidence, the verdict of the jury will not be disturbed by the Supreme Court.

Appeal from Franklin Circuit Court.

Lowe & Jeffries, for Appellant.

Halligan & Flanagan, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The respondent as trustee of Elizabeth M. Moore, a married woman, brought his action in the Franklin County Circuit Court, to recover damages against the defendant for wrongfully and unlawfully taking and carrying away certain personal property, being the products of a farm held in trust for the said Elizabeth. The defence was, that the property was seized and sold by the sheriff, by virtue of an execution in favor of the defendant Davis, against the husband of Elizabeth. It was also averred that the farm was fraudulently conveyed to the trustee, for the benefit and use of the said Elizabeth, for the purpose of cheating and defrauding the creditors of the husband.

The trial was submitted to the court without the intervention of a jury, and there was a verdict and judgment for the plaintiff.

No complaint is made in this court that there was any error

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committed below in reference to declarations of law. But it is expressly conceded by the appellants in their argument, that all the law necessary to be applied to the facts as developed in the cause were contained in the instructions given at their request.

It is now urged, however, that the finding of the court sitting as a jury, is against the weight of evidence. But this is not a chancery suit where the court reviews the facts; it is a proceeding at law, where we do not examine the evidence to judge of its weight. Where there is conflicting testimony we will not disturb the verdict of a jury, or the finding of a court sitting to try the facts.

The only question presented here is simply one regarding the weight or preponderance of testimony, and as there was evidence submitted to support the finding, we cannot interfere with the judgment.

Affirmed, all the judges concurring.

—o—

JACOB YANKEE, Appellant, *vs.* MARY A. THOMPSON, *et al.*, Respondents.

1. *Revenue—Tax Deed—Sale, notice of, etc.*—A tax deed given by the Register of lands, which recites that the lands therein described "were advertised according to law," but contains no further recital of notice of sale, is void on its face.
2. *Quieting title—Action for—Non-suit—Final judgment.*—In an action brought under the statute to quiet title, when plaintiff is forced by the action of the Court to take a non-suit, and files the usual motion to set the same aside, the Court errs in sustaining the motion and then entering a judgment forever debarring plaintiff from claiming any rights adverse to the defendant. The form of the judgment in such proceeding, should be the same that would be appropriate in suits brought in the ordinary way. It is only when the person ordered to sue makes default, or having appeared disobeys the order of the Court to bring the action and try the title, that the Court is authorized to enter such a judgment.

Appeal from Pettis County Circuit Court.

T. Wright, for Appellant.

I. The deed offered in evidence is in the usual form, duly

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recorded in the office of the Register, duly acknowledged by the Register, and duly recorded by the Recorder of Pettis. By the statute, such deed is made *prima facie* evidence of title.

II. The action of the court in refusing to permit plaintiff to take a non-suit, was clearly wrong—especially when it was done with the express view of bringing the case to this court—to try the very question decided; that is, whether the deed was void on its face. The decision of the court in declaring the deed void, was such as necessarily precluded the plaintiff from recovering. (*Hageman vs. Moreland*, 33 Mo., 86.)

III. The fact that the action was brought in furtherance of the action of the court, under the section for quieting titles, cannot take away this right—which is a common law as well as a statutory right. This is not a case in which the Court may make an order that plaintiff shall be forever barred and precluded from bringing another suit. That can only be done where plaintiff being summoned makes default, or having appeared shall disobey the lawful order of the court to bring an action to try the title.

IV. Plaintiff when summoned promptly appeared and immediately brought his action to try the title—and in trying his title, he is entitled to the same rights as if he had brought his suit without being required to do so.

Phillips and Vest, for Respondent.

I. The case being under the statute to quiet title the plaintiff could not take a non-suit; this would defeat the very object of the statute. Instead of quieting the title, this practice if allowed, would result in one non-suit after another, at the pleasure of the parties plaintiff, and no end to litigation would be attained.

II. The record is badly made, but it is evident that the Circuit Court intended by its last judgment, to set aside the first judgment entering the judgment of non-suit. Such is the effect of the last entry, and every intendment will be made by this court in favor of the action of the Circuit Court. The judgment is for the right party, and if reversed on account of

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the irregularities made in entering up the judgment, it would only result in the case being brought back for adjudication upon the same point now presented. (32 Mo., 366; 34 Mo., 338; 36 Mo., 143; especially, 29 Mo., 451.)

III. The deed is void on its face because it does not show that the land described therein was advertised for sale by the Register of Lands, in the manner which the statute required. The deed states that the Register advertised the land in the manner required by law, but this was only his opinion. The deed should show how it was advertised. *Abbott vs. Doling*, 49 Mo., 302; *Large vs. Fisher*, 49 Mo., 307.

EWING, Judge, delivered the opinion of the Court.

This action was instituted in the Circuit Court of Pettis County, pursuant to an order of said Court made under Section 53, Article 5 of the practice act relating to the quieting of titles. It is an action of ejectment. The answer is a general denial.

The plaintiff offered in evidence a Tax Deed for the lands in controversy, from Jared E. Smith, Register of Lands, dated November 22nd, 1865, duly acknowledged and recorded, by which the lands appear to have been sold in October, 1863 for the taxes due for 1861. Defendant objected to the reading of this deed on the ground that it is void on its face. The objection was sustained and the Deed excluded; whereupon plaintiff took a non-suit with leave to set it aside. The motion to set aside the non-suit and for a new trial having been overruled, the usual judgment was entered. Plaintiff thereupon tendered his bill of exceptions, which was signed and filed, and also an affidavit for an appeal. The record shows that some days subsequently, the motion to set aside the non-suit was re-considered and sustained, and at the same time a full judgment entered, that plaintiff be forever debarred from having or claiming any right or title adverse to the petitioner and those claiming under him. Plaintiff filed motions for a new trial and in arrest of judgment, which were overruled and exceptions duly saved. The cause is here by appeal.

The Act of March 27th, 1861, under which the deed was executed, provides, that the Register of Lands shall execute good and sufficient deeds of conveyance to all persons entitled thereto, conveying the lands or town lots in such deeds, (Section 34, Acts 1860-1, p. 85.) It is further provided, that such deed so executed and recorded shall, without any further notice be received in evidence in all Courts in which the title to any land or town lot purporting to be conveyed by the same shall be brought in question, and such deeds shall be received as *prima facie* evidence of title in fee simple in the purchaser; and the burden of proving that the title is not in the person holding under the deed, shall be upon those claiming adversely to such deed; and it is further provided that the Register of Lands shall be satisfied upon due examination that all the requirements of the law have been complied with before he executes a deed.

In regard to notice of sale it is provided, that on the first Monday in June annually, next succeeding the returns to be made by the Collector, which he is required to make immediately after the third Monday in November—the Register of Lands shall cause the lands and town lots remaining in his office, on the Delinquent Lists of the preceding year, on which taxes and interest have not been paid, and that may have been bought in or forfeited to the State, to be advertised for sale on the first Monday in October next thereafter, at the place of holding Courts in the respective Counties. The law then proceeds to point out specifically *how* the notice shall be given. (See Sess. Acts 1860-1, §§ 7, 8, 9, p. 81.)

It is but re-affirming well established principles, which have had the sanction of the Courts without exception, to say that the Register of Lands having no general authority to sell lands at his discretion, for the non-payment of taxes; but a special power to sell in particular cases, pointed out specifically in the Statute, these cases must exist or the power does not arise; that the proceeding being by special Act in derogation of common right, the statute itself must be strictly construed against the power; that the proceeding being *ex parte*

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and under special authority, nothing can be presumed in favor of the Act, but every requisite of the law must be shown to have been strictly complied with; if the power to sell did not exist the sale of course would be void.

This power only arises on the performance of certain acts specifically pointed out in the law. The omission to give any notice at all, would of course vitiate the sale. Can we give, to the mere recitals in the deed that notice had been given according to law, any effect as evidence of title? The mere assertion of the Register that he had performed his duty, in this respect, can scarcely raise the deed to the dignity of furnishing even *prima facie* evidence of title. The Courts, when the deed is offered in support of title, are to determine its legal effect, and whether it is evidence for any purpose. If the judgment or conclusion of the Register is all that is required, there is nothing for the Courts to pass upon, except the mere formal execution and authentication of the instrument. To have any effect as evidence, it must appear *prima facie* from the recitals in the deed, that he had the power to sell and convey. The Court can only judge of this from the recitals of the steps taken, and things done, which confer the power. When these are shown, the Court applies the law to them, and if it appear from the face of the deed—whatever the facts may be—that the several requirements of the law have been complied with, then the deed is received as furnishing sufficient evidence—until the contrary appears—of title in the party relying upon it. If this is not the proper construction of the law, then the court is to presume against all the principles of law, applicable to such sales, that the law has been complied with, and that the officers have performed their duties. (Reed vs. Morton, 9 Mo., 878; Morton vs. Reed, 6 Mo., 64.)

I am not aware that the precise question of the legal effect of a Register's Deed like that under consideration, has ever been decided by this Court. But in the numerous cases where sales of this character have been passed upon by this Court, the decisions are uniform in holding, that no presumption can be indulged in favor of their regularity, but that the law

must be strictly complied with, and that the pre-requisites to authorize a deed to be made, must be shown, or it will be void. (Reed vs. Morton, 9 Mo., 878; Donahue vs. Veal, 19 Mo., 331; Keene vs. Barnes, 29 Mo., 377; Stierlin vs. Daly, *et al.*, 37 Mo., 483.)

If one or more of the essential requirements of the law may be omitted in the deed, why not all of them be omitted? If it be unnecessary to state how notice was given of sale, why is it material to recite the time or place of the sale, or that several tracts of land or lots described in the deed were sold separately, and at a certain price for each tract, or in what manner the collector conducted the sale, or that the land was assessed in the name of a particular person?

All of these particulars, except the first, are recited in this deed, and yet that which is most essential, that on which arises the *power* to sell and convey is omitted. Upon such a theory the most compendious instrument that could be framed, if it only set forth the facts of a sale, the price, a description of the property, and name of the purchaser, would be "a good and sufficient deed" and *prima facie* evidence of title in fee simple.

In an early case, (Morton vs. Reed, 6 Mo., 63,) a similar question arose as to the effect of the Auditor's certificate. By the law then in force, 1826-7, the certificate of the Auditor as to certain requirements of the law, regarding the advertisement of the lands for sale for taxes, was made *prima facie* evidence of the facts contained in such certificate, whenever a sale made under such advertisement should come in question.

The certificate in that case as in this, simply stated the conclusion of the Auditor, that he had made the advertisement according to law. The Court held that the certificate proved nothing, for the reason that the facts were not set out in detail; see same case, 9 Mo., 379. In a late case, Lagrone vs. Rains, 48 Mo., 536, a tax deed of the County Collector was held void on its face, for the reasons that the Collector gave notice of an intended application to have judgment entered up against the delinquent land, by written instead of printed advertisements. By the Act under which the deed was execut-

ed, (Laws Mo. Adj. Session 1863, 1864, § 22, p. 89,) deeds executed by the Collector were made conclusive that every act and thing required to be done by said act had been complied with—permitting, however, the party controverting the deed and the title thereby conveyed, to show that the land was not subject to taxation; that the taxes had been paid, or that the land had been redeemed before the execution of the deed. The same question was before this Court in the still more recent cases of *Spurlock vs. Allen*, 49 Mo., 178; and *Abbott vs. Doling*, Id., 302, which re-affirmed the principles of the previous case of *Lagroue vs. Rains*, and held the deeds void on their face, because they did not set out the facts showing affirmatively that the required notice of the sale had been given.

Such must be the deduction from the proposition, that the power to sell does not attach or is not brought into existence until the notice, in the mode prescribed by law, has been given. The same rule it is conceded applies with equal force to the Register of Lands and Collectors, while acting in the same capacity. It is true the Register did not make the sale in person, and may not be presumed to have personal knowledge of all that is done by other officers who have certain duties to perform under that branch of the Revenue law. But he must, in the language of the law, be satisfied upon due examination, that all the requirements of the law have been complied with before he executes a deed. If he can certify that notice was given according to law, as he has done in this instrument, he is presumed to have based this recital upon facts which it was his duty as an officer to know. And if he is able to state his conclusion from such facts, he can state the facts from which the conclusion is drawn.

I am of opinion that the deed is void, for the reason that it does not show affirmatively by a proper recital of facts, that the land described therein was advertised for sale, in the manner required by law.

The Court erred in sustaining the motion to set aside the nonsuit after it had been passed upon and overruled, and in enter-

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ing judgment, that plaintiff be forever debarred and estopped from having or claiming any right or title adverse to the petitioner.

This action of the Court was the result of a misconception of the law in regard to plaintiff's right to take a non-suit.

We are unable to perceive any reason why the ordinary rule of practice in this respect, should not apply as well to cases like this as to suits brought in the usual manner. The action of the Court in excluding the Register's deed was such as to preclude a recovery, and the plaintiff was therefore driven to a non-suit.

The last judgment entered by the Court after setting aside the non-suit, was erroneous. Where the suit is brought pursuant to an order of the Court and a trial is had, the form of the judgment should be the same that would be appropriate in suits brought in the ordinary way. It is only where the person ordered to sue makes default or, having appeared, disobeys the order of the Court to bring an action and try the title, that the Court is authorized to enter such a judgment as was rendered in this case.

The judgment of the Circuit Court is reversed, and the judgment entered on the non-suit is affirmed. The respondents paying the costs of this appeal, and the appellants the costs in the Circuit Court. The other Judges concur.

—o—

JAS. F. HARDIN, Respondent, vs. JAMES LEE, Appellant.

1. *Lost deed—Proof of contents—Record—Imperfect acknowledgment.*—The contents of a lost deed cannot be proved in evidence, after the record thereof had been rejected for want of proper authentication of the certificate of acknowledgment, and without otherwise proving its execution.
2. *Jurisdiction of subject matter—Judgment not set aside collaterally—Executions, etc.*—In attachment suits the jurisdiction over any given subject matter is obtained by the levy thereon of a writ properly issued, and no matter what or how great irregularities may subsequently occur, its judgment in regard thereto will be valid and binding, until reversed by error or appeal, or set aside in a direct and appropriate proceeding for that purpose. A judgment can never be vacated collaterally; and never by a stranger under any circumstances. And the same rule applies to erroneous executions.

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*Appeal from Greene County Court.**McAfee & Phelps*, for Appellant.

The judgment could have been set aside for irregularity upon motion, at any time within three years, but was not void. And unless the judgment was absolutely void a title passed under the proceedings. (*Perryman vs. Relfe*, 8 Mo., 208; *McNair vs. Biddle*, 8 Mo., 257; *Massey vs. Scott*, 49 Mo., 278; *Groner vs. Smith*, 49 Mo., 318; *Higgins vs. Peltzer*, 49 Mo., 152; *Martin vs. Barron*, 37 Mo., 305; *Vories vs. Bank*, 10 Pet., 472, and cases cited; *Cooper vs. Reynolds*, 10 Wall., 308, and cases cited.)

Bray & Hardin, for respondent.

The case on which the Sheriff's deed is based, was brought whilst the statute of 1855 was in force. Under that statute no suit could be brought for injuries to the person, by attachment. (§ 1, ch. 12, 1 R. C., 1855, 238.)

That the court had jurisdiction over a case for damages for false imprisonment by an action of attachment, will not be claimed; and it would be a ridiculous stretch of the refining process to say that the plaintiff might sue an absent defendant for five thousand dollars for false imprisonment, and by tagging on to his petition a claim for one hundred dollars for the value of a horse, thereby make a case whereon a valid writ of attachment might issue.

That the plaintiff might have taken a writ of attachment for the matter contained in the second count we admit, but when "he combined it in the suit with the matter in the first count, he barred his right to attachment process.

"It ought not to be permitted a plaintiff to bring suit by attachment. * * (unauthorized by law) merely because he may have made an affidavit in pursuance of the statute, so as to entitle him to the writ. * * This would be perpetrating a fraud upon the law." (*Elliott vs. Jackson*, 3 Wis., 649.)

Courts can only acquire jurisdiction by the proper legal

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process and cannot take jurisdiction by wrongful means, and if they do so all their proceedings are void and everything based upon such proceeding is void. (19 Johns., 39; 1 Hill, 130; 9 Johns., 239; 1 Den., 141-158; 5 Blackf., 462.)

SHERWOOD, Judge, delivered the opinion of the court.

Action of ejectment brought by James F. Hardin in the Greene Circuit Court against James Lee. Petition in usual form. Answer, a general denial. Both parties claim title through one W. W. Blackman. At the trial, plaintiff testified as to a deed made to him in February, 1868, by Blackman, which deed was lost and appears to have been defectively acknowledged, by reason of the seal of the notary who took the acknowledgment, not having been affixed thereto. The plaintiff then introduced the record of said deed which also showed a defective authentication of the acknowledgment. The court excluded the record of said deed, but permitted plaintiff to establish its contents against objections of defendant. Defendant then offered and read in evidence a sheriff's deed to Ingram for the property in controversy, made long prior to the one made by Blackman to plaintiff, and reciting the issuance and levy of a writ of attachment on the property in controversy, in a suit of Watts against said Blackman and others, judgment, and sale upon execution of said property to Ingram. Defendant also read in evidence a deed from Ingram to him for said property and rested. Plaintiff then, against the objections of defendant, read in evidence the record, proceedings and files in said cause of Watts against Blackman and others, from which it appeared that said suit was founded on wrongs for personal injuries, and for taking personal property. The proceedings were by attachment and appear to be sufficiently regular, with the exception above stated. The petition contained two counts, the first claimed damages for injuries to the person, to the amount of \$5,000, and the second for \$125 for taking personal property. The judgment was for \$1,500 in gross, and ordered a special execution to issue. The court then without any further evidence,

excluded the sheriff's deed to Ingram, and the deed of the latter to defendant, and he excepted. The court then gave a declaration of law sustaining its own action in permitting plaintiff to prove the contents of the deed to him from Blackman, after the rejection of the record of said deed, and another declaration to the effect that all the proceedings in the suit of Watts vs. Blackman and others, were *absolutely void*, and that Ingram derived no title thereunder, to which defendant excepted. Counter declarations were refused defendant, and he again excepted, and judgment being given for plaintiff, after an unsuccessful motion for a new trial, defendant brings this case here by appeal.

It was a strange ruling indeed, which permitted the plaintiff to prove the contents of his lost deed after the rejection of the record of that deed for lack of proper authentication of the certificate of acknowledgment, and without otherwise proving its execution. (Patterson vs. Fagan, 38 Mo., 84; W S., p. 277-8, §§ 29, 30.)

But the main question in this case is, whether the proceedings in the case of Watts against Blackman and others were valid.

It is a rule universal in its acceptation, that when a court once acquires jurisdiction of a subject matter, any subsequent error or irregularity will not divest it. In attachment causes, the jurisdiction over any given subject matter is obtained by the levy thereon of a writ properly issued—and no matter what, nor how great errors or irregularities may subsequently occur, the *res* remains still in the grasp of the court, and its judgment in regard thereto will be valid and binding until reversed on error or by appeal, or set aside in a direct and appropriate proceeding for that purpose. Vacating a judgment can not be done collaterally, and never by a *stranger* under any circumstances. And yet this is the very attitude that this plaintiff occupies toward the Watts judgment and proceedings against Blackman.

That this judgment could have been amended no one can for a moment doubt; our statutes respecting amendments are almost illimitable in their scope.

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Proceedings which are amendable are not void. The very fact that the court can make the amendment shows *ex vi termini*, that the proceedings are merely *erroneous*, or irregular, and that the court has *jurisdiction*. (Hunt vs. Loucks, 38 Cal., 372; Parmelee vs. Hitchcock, 12 Wend., 96; Cooper vs. Reynolds, 10 Wall., 308.)

In Durham vs. Heaton, 28 Ill., 264, it is said: "A void writ has no vitality and nothing exists by which it can be amended—the breath of life cannot be infused into it, and it is a nullity. Not so with a writ voidable only, * * and all acts done under it, are valid and binding until set aside."

In Hunt vs. Loucks, *supra*, the court says: "Like an erroneous judgment, an erroneous execution is valid until set aside upon a direct proceeding brought for that purpose, and until set aside, all acts which have been done under it are also valid. In a collateral action it cannot be brought in question, even by a party to it, much less, as in this case, by a stranger to it. Even directly it can not be attacked by a stranger, for it does not lie in the mouth of A. to say, by it B. has been made to pay too much money, and therefore all proceedings under it are null and void."

Tested by the rules above laid down, which are sustained, as I am fully satisfied, by the authorities cited, the judgment of Watts against Blackman and others was although grossly erroneous, yet not void—and the plaintiff in the present action is not in a condition to assail that judgment, either directly or indirectly, even if his deed from Blackman were unexceptionable in every particular.

With the concurrence of the other judges, the judgment will be reversed and the cause remanded.

—o—

JOHN D. BRIGGS, Respondent, vs. DAVID EWART, Appellant.

1. *Bills and notes*—Signature obtained without consent of maker—*Libiality of maker*.—The maker of a promissory note whose signature is obtained without his consent will not be held on the note, even in the hands of an innocent holder for value before maturity.

Briggs v. Ewart.

*Appeal from Pettis County Common Pleas Court.**Phillips & Vest, for Appellant.*

The paper sued on was not the note of Ewart, his mind gave no assent to its creation. Nor was he guilty of laches so as to bind him. Nor is genuineness of signature alone sufficient to bind him. (State Bank vs. McCay, Am. Law Times, April 1871, Vol. 4, pages 76, 79, 80; Whitney vs. Synder, reported in Albany Law Journal 7th January, 1871, No. 1, Vol. 3, p. 3; Foster vs. MacKinnon, 4 English, Com. Pl., 704; Awde vs. Dixon, 6 Exch. R., 869, 872.)

Snoddy & Bridges, for Respondent.

A party who signs a negotiable note upon the representations of another, taking it for granted that the paper is what it is represented to be, does so at his peril; and if an innocent purchaser obtains the same for value before maturity, and without notice, he can recover the amount of the note from the maker. All the authorities indicate that the maker of negotiable paper is not permitted to interpose any defense to a note in the hands of an innocent purchaser, except in cases where he is not chargeable with any laches or neglect or misplaced confidence in others; and where a blank is in the form of a note, and is intrusted to another either through misrepresentations or otherwise, without any authority to fill the blanks, he is yet liable to a *bona fide* holder for value. (See leading case on this subject, Putnam vs. Sullivan, 4 Mass., 45.)

If Appellant signed the note on such false and fraudulent representations set forth in said instruction without examination for himself, he was guilty of negligence, and as a necessary consequence, in fault.

Even if the Respondent did sign the note upon which this suit is founded, believing that it was not a note, but under the impression that it was in reality a duplicate order, from the false and fraudulent representations of the payee in the note, it constitutes no defense to this action. Although a note be obtained by robbery or theft, and there is really no actual fault or

negligence on the part of the maker, yet this constitutes no defense against a *bona fide* holder for value.

It is the settled law of the land that one who takes negotiable paper transferable by delivery, acquires an absolute property in it, and may recover upon it, although the paper was fraudulently put in circulation, and had been stolen, provided he takes it in good faith for a valuable consideration, even though guilty of gross negligence in doing so. The burden of proving good faith may be on the plaintiff, but this is *prima facie* implied by possession. This doctrine is not disputed, and is reiterated in all the texts books on bills and notes.

Where the holder of negotiable paper receives it without notice of any equities that may exist between the maker and payee, he is a holder without notice and in good faith; and the holder who is guilty of no fraud and has no actual or constructive notice, is protected. (See Parsons on Notes and Bills, Vol. 1, page 275, 276.

ADAMS, Judge, delivered the opinion of the court.

This suit originated before a justice of the peace, and was founded on the following note:

"\$150. SEDALIA, February 24, 1870.

On or before the 10th day of June, 1870, for value received, I, the subscriber, of Mt. Sterling Township, County of Pettis, State of Missouri, promise to pay S. R. Squier or order, one hundred and fifty dollars without discount or defalcation, and with interest at 10 per cent. from date, at Sedalia, Mo., P. O."

DAVID EWART.

A judgment was rendered against the defendant by the justice, from which he appealed to the Common Pleas Court.

On the trial in the Common Pleas, evidence was given conducing to show that the defendant's signature to the note was obtained by Squier, the payee, in the following manner: He went to defendant's house late in the evening and proposed to sell his son a patent pump; he had been there before for that purpose and the defendant had advised his son not to purchase. Squier brought a model of the pump with him and proposed to appoint the defendant's son agent for the sale of

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the pumps, and the son agreed to take the agency. The defendant agreed to vouch for his son, and a contract of agency was produced by Squier, by which Squier made the son agent, and the son with the defendant signed the agency contract to account for the proceeds of sales, etc. This was after dark and a lamp was lighted. Squier then produced a printed order with necessary blanks for the defendant to sign and keep as the form of an order for pumps to be sent to the agent. The defendant read over this form and signed and retained it. Squier then rose to his feet and seemed in a great hurry to start, and drew out what he said was a copy of the order and that the defendant must sign it to send off at once to New York for the pump—that he would take it right into town with him and mail it that night. He said the papers were just the same. They looked just alike. He hurried up defendant, had his own pen and ink with him, and defendant signed the paper as and for an order for a pump. Defendant in his evidence stated he never signed the paper as a note but as an order. That he never delivered any paper to Squier as a note, and the only papers he intended to make were the agency contract and the order for a pump. That Squier took his paper off with him as an order for a pump.

On the part of the plaintiff it was in evidence that he purchased the note from Squier for \$125, without any knowledge or notice of the alleged fraud in obtaining the signature of the defendant. That Squier sold it to him a short time after its date and before maturity.

This suit was brought by plaintiff as assignee of the note.

The defendant asked the court to declare the law to be, that "although the court should find from the evidence that the defendant did write his name on or to the paper herein sued upon, yet if the court further finds from the evidence that the signature of defendant was obtained thereto without the fault or negligence of defendant, on the fraudulent representations of the payee that the paper to which it was put was a mere duplicate of the order read in evidence, and that the defendant neither knew it was a note, nor intended to sign a note,

but supposed it was such a duplicate, and that the plaintiff did not pay therefor a full and valuable consideration, then the court will find the issues for the defendant."

Other instructions not covering the point raised by this one, were given and refused, and some were given for plaintiff, in conflict with this instruction. The verdict and judgment were for plaintiff. The instruction above set forth raises the only point necessary for us to consider.

It may be assumed as an axiom too well settled to be disputed, that no one can be made a party to a contract without his own consent. Although his signature may be put to the writing, and may have been written by himself, yet if he did not know what he was signing, but acted honestly under the belief that he was signing some other paper and not the one he really signed, he ought not to be bound by such signature. In the execution of instruments of writing, such as contracts, deeds, etc., the mind must act intelligently, and the instrument must not only be signed but delivered by the party, as, and for what he intended it for.

Commercial paper is no exception to this rule, only that in some cases a party knowingly putting his name to such paper, may, by his own negligence, be estopped from disputing its execution as against an innocent holder for value.

For instance, if a person knowingly signs a negotiable note and it is stolen from him and gets into the hands of an innocent holder before maturity, he must suffer the consequence of his own negligence. In such case he knows that he has signed a note, and that it only needs delivery to constitute a valid instrument. So when it is delivered, no matter by whom, to an innocent holder, he is estopped by his own negligence from denying that he authorized its circulation. It was his own folly to sign the note and leave it in existence. But if a party is compelled by duress to sign a note, or is insane when he signs it, or signs a blank paper for no purpose at all, and leaves it on his table, and a note be written over it and put into circulation without his knowledge, I know no principle of commercial or other law that will compel him to pay it, wheth-

er in the hands of an innocent holder or not. The point is that the mind must act in the execution of the paper. It must be executed as and for the paper it purports to be. If the mind is drawn away from it by fraud or otherwise, and the party is induced to sign it as and for another instrument different from what it purports to be, then there is no consent given and no delivery made or authorized to be made of the paper so signed. If such paper purports to be a negotiable note it is void as to the payee and all other holders, whether innocent purchasers or not.

Parties dealing in commercial paper must ascertain whether it was knowingly signed or authorized to be signed by the payer, and this is the only inquiry an innocent purchaser is bound to make.

If the evidence given on behalf of the defendant be true, his name was obtained to the note without his consent. He did not know that it was a note, but believed it to be a mere order for a pump, and signed and delivered it as such and not as a note.

I have not been able to find any direct authority in conflict with these views. In the case of *Clark vs. Johnson*, 54 Ills., 296, the court held that a party executing a note for a plowing machine was bound to pay it to an innocent holder, although he intended to add a condition to the note after it was written and signed, and before he could do so the payee snatched it from him, and sold it to an innocent purchaser. This seems to be carrying the doctrine beyond its proper limits. The case does not appear to have been well considered. No authorities are cited either by the counsel or by the court, except the case of *Shipley vs. Carroll, et al.*, 45 Ills., 285, where the maker was held liable on a stolen note in the hands of an innocent purchaser.* In the case of *Shipley vs. Carroll*, it was intimated that if the execution of the note had been obtained by fraud it would have been void under their statute, which allows the maker of a note to set up fraud and circumvention in the execution of a note as a defense. This statute, in my judgment, is only declaratory of the common law. What

greater fraud could have been practiced than to induce a party to draw a note, and before its delivery, and before a condition was added to make it complete, to snatch it and run away with it? But that was not a parallel case with the one at bar. In *Nance vs. Lary*, 5 Alabama, 370, the court held that where one writes his name on a blank piece of paper, of which another takes possession, without authority, and writes a promissory note above the signature, which he negotiates to a third person who is ignorant of the circumstances, the former is not liable as the maker of the note.

In *Foster vs. Mackinnon*, 4 Law Reports (English Common Pleas), 704, which is very much in point and seems to have been well considered, the court held that where a defendant was induced to put his name upon the back of a bill of exchange, by the fraudulent representation of the acceptor that he was signing a guarantee, he was not liable as an indorser at the suit of a *bona fide* holder for value.

The Supreme Court of New York, in the case of *Whitney vs. Snyder*, 2 Lansing, 477, (a case directly in point) held that in an action on a negotiable promissory note, brought by a purchaser thereof before maturity, in good faith and for a valuable consideration, against the maker, the latter may prove as a defense that when he signed it, it was represented to him and he believed it to be a contract entirely different in character. The court distinguished his case from a note fraudulently obtained and which the maker intended to make.

In *Gibbs vs. Linabury*, 22 Mich., 479, a case precisely in point—except that was a hay-fork and this a pump, the court held that when the defendant unwittingly signs an instrument in the form of a negotiable note, relying upon false representations made to him at the time that the instrument he is signing is the mere duplicate of a contract just previously signed by him, making him an agent for the sale of a patent hay-fork, under circumstances devoid of any negligence on his part, and when fraudulent means are taken to prevent him from noticing the body of such pretended duplicate, and he delivers the same in ignorance of its true character, believing it to be the mere

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duplicate contract which he supposed he had signed, such instrument is to be regarded as a forgery, and cannot be enforced even in the hands of a *bona fide* purchaser.

These cases were all well considered and lay the rule down as it should be in regard to the execution of commercial paper, without in the least impugning the well settled doctrine that no inquiry can be allowed as to the consideration of such paper, as between the maker and an innocent indorser for value.

I think, both upon reason and authority, the instruction under review ought to have been given and those in conflict with it refused.

Let the judgment be reversed and the cause remanded. The other judges concur.

—o—

THOMAS W. HOWE, Plaintiff in Error, *vs.* W. P. WILLIAMS
Defendant in Error.

Deeds—Ambiguity.—Recital of county, etc.—Where land is accurately described in a deed by section, township and range, and the deed is regularly acknowledged by a Justice of the Peace of one of the counties of this State, it is not incompetent as evidence from the further fact that it does not recite the names of the county and state in which the lands are situated.

Error to Dent Circuit Court.

Ewing and Smith, for Plaintiff in Error, cited *Hardy vs. Matthews*, 38 Mo., 121; *Bates & Wise vs. Bank of Missouri*, 15 Mo., 309; *Long vs. Wagoner, et al.*, 49 Mo., 178; 1 *Brightly's Digest*, (U. S. Laws,) 650, § 27.

C. C. Bland, for Defendant in Error.

Cited.—*Washb. on Real Property*, 2d Ed., 661; *Boardman vs. Reed*, 6 Pet., 328; *Mason vs. White*, 11 Barb., 173; *Campbell vs. Johnson*, 44 Mo., 247; *Ashley vs. Bird*, 1 Mo., 640; *Lane vs. Price*, 5 Mo., 101; *Singleton vs. Fore*, 7 Mo. 515; *Davis vs. Davis*, 8 Mo., 56; *Reed vs. Austin*, 9 Mo., 723; *Bates vs. Bank of Mo.*, 15 Mo., 309; *Murdock vs. Ganahl*, 47 Mo., 135; *Richmond T. & M. Co. vs. Farquar*, 8 Blackf.

89; Cook vs. Parkarson, 16 Louisiana, 129; Bennett vs. Hubbard, Minor, 270; Doe. d Tyrell vs. Lyford, 4 M. & S., 550; Stead vs. Perrier, Sir T. Raym, 411; Bac. Max., Reg., 23; Broom's Max., 584; 1 Greenl, on Ev., 297; Wigr. Extr. Ev., 3d Ed., 120, 121; Beard vs. White, 1 Alabama, 436.)

WAGNER, Judge, delivered the opinion of the court.

This was an action of ejectment brought in the Dent Circuit Court, by plaintiff against the defendant to recover certain lands.

The answer was a general denial, except as to the possession.

For the purpose of showing title, the plaintiff read in evidence a Patent from the United States for the lands, and then offered a deed from one Poindexter and wife to him, conveying the said lands, but the deed did not recite the County in which the lands were situated, nor the land office in which they were subject to sale. The defendant objected to the reading of the deed in evidence because the description of the same was uncertain and indefinite, and did not show in what County the same were situated, what principal Meridian they were west of, nor in what Land office they were subject to entry and sale. The Court sustained the objection, and the plaintiff took a non-suit, and after an ineffectual motion to set the same aside, he has brought the case here by writ of error.

The land is accurately described in the deed by section, township and range, and the deed is regularly acknowledged before a Justice of the Peace of Dent County, but it is not stated in what County the same is situated. The uncertainty of description and ambiguity is supposed to exist from the fact, that under the United States system of surveys the description would apply to lands in other states, as well as to the land in question. If the deed, from the circumstances surrounding it, substantially shows the land to be in this State, then the ambiguity at once disappears, for there is no other parcel of land in Missouri that answers to the description contained in the Deed. (Long vs. Wagoner, 47 Mo., 179.)

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If the deed sufficiently identifies the land as being located in this State, then there can be no controversy, as there are no other lands answering the same description.

Washburn in speaking of the rules in regard to the construction of the descriptive parts in deeds, says, one of these is that the deed is to be construed with reference to the actual rightful state of the property at the time of its execution. And that in construing a deed, the Court places itself as nearly as possible in the situation of the contracting parties, and their interest will be ascertained in the same manner as in the case of any other contract. (3 Washburn Real Prop., 3d Ed., 333.)

Applying these rules it is hardly susceptible of doubt as to what the parties intended, the one to convey and the other to receive.

The land is found to exist in Dent County, the deed was executed in that County, and the acknowledgment taken before an officer who had authority to take acknowledgments only in that County.

Under such circumstances the intention was unmistakable and the conclusion inevitably follows, that the land in Dent County was the land actually sold and conveyed.

Did other lands exist in that County answering to the same description, the result might be widely different. Taking all the circumstances together, I think the deed should have been admitted in evidence.

A different ruling would defeat the ends of justice, and be clearly contrary to the intentions of the parties.

For which reasons the judgment should be reversed and the cause remanded.

All the other judges concurring.

—o—

STATE, *Ex rel.*, S. W. STREET, Plaintiff in Error, *vs.* GEORGE A. BEZONI, *et al.*, Defendant in Error.

1. *Merchant's license.*—Action on bond of town marshal for failure to issue.—
An action for damages will not lie against a town marshal on his official bond,

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on account of his refusal to issue a merchants' license, where no blank licenses have been ordered by the town council, nor issued by the clerk.

Error to Dent Circuit Court.

A. J. Seay, for Plaintiff in Error.

WAGNER, Judge, delivered the opinion of the court.

This action was brought on an official bond given by defendant as Marshal of the town of Rolla, and damages were claimed in consequence of his refusal to grant a Merchant's License to the plaintiff, on application being made and bond tendered according to law.

The defence set up was that the town council had not ordered, and that the clerk had not issued to the defendant, any blank licenses; and he was therefore neither authorized nor empowered to grant the same. The law provided that the town clerk should issue as many blank licenses for vendors of goods, wares and merchandise, as the town council should direct, and that the clerk should deliver to the Marshal all licenses so issued, and charge him therefor. After hearing the evidence, the Court declared the law to be, that unless the Council ordered blank licenses to be issued by the clerk, and unless the clerk furnished them to the defendant, then the defendant was not liable.

We think the declaration of law was correct. Until the blank licenses were ordered by the Council, and issued by the Clerk to the defendant, he had no power to grant licenses to anyone. And it is immaterial what reason he assigned for the refusal.

The Court found for the defendant. It was the proper judge of the evidence, and no reason is perceived why the judgment should be disturbed. Affirmed.

The other Judges concur.

Mayberry, et al., v. McClurg, et al.

WM. J. MAYBERRY, *et al.*, Appellant, *vs.* JOS. W. MCCLURG, *et al.*, Respondent.

1. *Judgment collusively obtained, set aside when.*—A judgment collusively or fraudulently procured, should be set aside at the instance of the party against whom it was rendered.
2. *Equity—County Court—Administrator.—Proceedings to set aside allowance of demand against estate—Parties.*—In proceedings in equity to set aside an allowance by the County Court of sundry demands against the estate of a deceased person on the ground that the same were obtained by collusion between the claimants and the administrator. 1st: It is not necessary that the latter should be joined. 2nd. The bill would not be multifarious where the matters charged were part of the same general transaction, in which all the claimants participated, and in the results of which all were interested.
3. *County Courts.—Jurisdiction of, in trespasses of deceased.*—County Courts have jurisdiction of demands against the estate of deceased persons, based on alleged trespasses by the deceased. (See Act concerning the judicial power of Courts, R. C., 1855, p. 534-5, § 15; see also W. S., p. 440-7.)

Appeal from Hickory Circuit Court.

F. P. Wright, for Appellant.

The demands which can be legally presented for allowance, under the statutory notice to the administrator, arise on contract alone, either express or implied, or upon a judgment obtained for the same. And for trespasses to property the damage must be first ascertained.

The reading of the statute implies this construction:—

1st. Any person may exhibit his demand against the estate, by serving on the executor or administrator a notice in writing stating the amount and nature of the claim, with a copy of the instrument of writing or account on which the claim is founded. An account, as expressed in the statute, implies a dealing between parties. There can be no account unless there is a liability under an express or implied contract. It implies that one is responsible to another for monies or other things, either on the score of contract or some fiduciary relation of a public or private nature, created by law or otherwise. (1 Metc., 217; 1 Bouv. Law, Dic., p. 53.) The idea that one can charge another in an account, for libel, slander, trespass, and the like, finds no sanction in the law.

2d. No demand can be allowed against an estate unless the claimant first makes oath and files his affidavit, "that he has given credit to the estate for all payments and offsets." There can be no set-off in trespass. (*Johnson vs. Jones*, 16 Mo., 494; *Moore vs. Otis*, 18 Mo., 121; *Id.* 158; 19 Mo., 125.

The statute makes ample provisions for establishing demands against wrong doers, by first obtaining a judgment and exhibiting such judgment for allowance. (W. S. 102, § 8; R. C. 1855, 155, § 8.) The case of *Moore, Exr., vs. Brown, Adm'r of Grey*, 14 Mo., 165, so much relied on, has no application to this case.

In that case the decedent, by converting the slave, had made it a money demand, and could be well charged with the value of the slave.

McAffee, Phelps and Young, for Respondents.

I. The petition is clearly bad. It shows upon its face a defect of parties defendant. It is alleged in the petition that Wilson, the administrator of the estate of Mayberry, deceased, assisted Deft. McClurg in procuring the alleged fraudulent allowance order of sale, and sale of the real estate. He is therefore a necessary party defendant.

II. The pleadings do not connect the defendants Johnson and Torbeck with the alleged fraud, nor in any way implicate them, or show that they have any interest whatever in the real estate alleged to have been fraudulently sold, and bought in by Defendant McClurg. Hence they are improperly joined as parties defendant.

III. The County Court of Hickory County at the date of said allowance, had Probate Jurisdiction, and as such had jurisdiction of the demand presented by plaintiff for allowance, against the estate of John Mayberry, deceased. (R. C., 1855, Art. 2, § 26; *Id.* Art. 4, § 9.)

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EWING, Judge, delivered the opinion of the Court.

This is a proceeding in equity to set aside an order of allowance, made by the County Court of Hickory County, in 1870, in favor of J. W. McClurg and Marshall W. Johnson, against the estate of John Mayberry, deceased, and to set aside certain orders and sale of real estate, and the deeds duly executed to McClurg under said sales. The petition charges in substance, that the said J. W. McClurg and Marshall W. Johnson combining and confederating with one, Jas. R. Wilson, the administrator of Mayberry's estate, to cheat and defraud plaintiffs, the heirs of said deceased, on or about the 11th day of February, 1865, appeared before the County Court of said County, and falsely pretending that said Mayberry in his life-time had been guilty of a trespass against the property of said defendants, presented a demand against said estate on account of such alleged trespass, for the sum of \$10,925; and falsely pretended that the same should be allowed against said estate, when in truth, and in fact, the said defendants neither as a firm or otherwise had any demand against said estate, nor any account whatever, and that said administrator, for the fraudulent purpose of aiding said defendants in having their pretended demand fraudulently allowed, and for the purpose of aiding said McClurg to buy said land, and fraudulently to deprive plaintiff thereof, appeared and fraudulently waived notice of the same, and failed to make any defense thereto, being fraudulently persuaded by defendants so to do, well knowing that they had no legal demand against said estate, and that the same could have been successfully defended. It is further averred that said defendants procured by fraud the said pretended demand to be allowed against said estate for said sum. The petition then proceeds to allege the fraudulent procurement by said Wilson and McClurg, of sundry orders of sale by the County Court, of said real estate, to pay said allowance, and the sale of the same to said McClurg.

The cause is here on a demurrer to said petition.

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1. The petition alleges a state of facts, which if proved would unquestionably entitle plaintiffs to the relief sought.

It contains a narrative of the facts of the plaintiff's case, and of the wrongs and grievances of which they complain with as much minuteness as is necessary.

A judgment collusively or fraudulently procured, should be set aside at the instance of the party against whom it was rendered. (*Miles vs. Jones*, 28 Mo., 87; *Harris vs. Terrill's Executor*, 38 Mo., 421, and authorities cited.)

2. Wilson the Administrator, is obviously not a necessary party to the suit. He is not interested in the subject of the suit, nor could the plaintiffs have any decree against him. And as he is not a party to the interest involved, he need not therefore, have been made a party to the suit. McClurg and Johnson, as the bill shows, are the only persons having any interest adverse to the plaintiff or that could be affected by the decree. It may be here observed, that there is nothing in the petition connecting the defendant Torbech, with the alleged fraudulent transaction or showing any liability on his part.

3. The petition is not liable to the objection of multifariousness. This is not a case where different matters having no connection with each other, are joined in the petition against several defendants, a part of whom have no interest in, or connection with some of the distinct matters for which the suit is brought. The cause of action affects both McClurg and Johnson. The petition shows that both were parties to the fraud and collusion in procuring the allowance of the orders for the sale of the real estate, and that McClurg purchased the property, the purchase money being credited on an allowance made in their favor.

It is obvious that these several matters were parts of the same transaction, in which both participated, and in the results of which both are interested. (*Tucker vs. Tucker*, 29 Mo., 350, and cases cited.)

4. Had the County Court of Hickory County jurisdiction of the demand allowed by that Court against the estate of Mayberry? This point does not arise upon the record, but as the

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counsel on both sides request the opinion of the Court upon it, in view of the question coming up for decision hereafter in the Court below, we deem it not improper to give it.

County Courts have exclusive original jurisdiction to hear and determine all suits, and other proceedings instituted against executors and administrators, upon any demand against the estate of their testator or intestate, when such demand shall not exceed one hundred dollars; and concurrent jurisdiction with the Circuit Court in all such cases, when the demand shall exceed that sum, subject in all cases to an appeal to the Circuit Court, in such manner as may be provided by law. (1 R. C., 1855, § 15, p. 535.)

Section 9, Article 4, of the Act respecting executors and administrators, confers the same jurisdiction on the County Court as above, with the power to hear and determine all offsets and other defenses allowed by law, set up by the administrator or executor. (1 R. C., 1855, 153.)

We are also referred to Art. 2, section 26, of the same act as conferring the jurisdiction claimed, which says that, "for all wrongs done to the property, rights or interests of another, for which an action might be maintained against the wrong-doer, such action may be brought by the person injured, or after his death by his executor or administrator against such wrong-doer, and after his death against his executor or administrator, in the same manner and with like effect in all respects as actions founded upon contract. (1 R. C., 1855, 133.)

I am of opinion that this last provision does not confer any jurisdiction on the County Courts. Its object was to give executors and administrators the right to sue, and to subject them to liability to be sued in a class of cases in which no such right or liability existed at common law. This provision it will be observed is wholly silent as to the forum which is to hear and determine such suits. And in view of the other provisions above quoted, which define specifically the powers and jurisdictions of County Courts, and which dispose of the whole subject, this section should not be construed as having any other different import from that indicated.

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I will not be understood as saying, that the County Courts have no jurisdiction in any of the cases contemplated by this section. So far as such cases are comprehended in the jurisdiction elsewhere conferred, they would of course, have the power to hear and determine them.

It remains to determine whether any other provision of law gave the County Court of Hickory County, jurisdiction of the demand under consideration, which was for an alleged trespass upon the property of the plaintiff. The language of the Act, "to hear and determine all suits and other proceedings against executors or administrators, upon demands against the estate of the testator or intestate," is almost as comprehensive as it would be possible to make it. The word "demand," says Lord Coke, is one of the most comprehensive terms in the law. (Co. Litt. 291 b.) It is defined by other writers, to be a claim, a legal obligation. In the matter of Denny and Manhattan, 2 Hill, 220, Nelson, C. J., says, "the term 'demand' is one of the most extensive import, among the most so, indeed, of any that are known to the law."

A release of "demands" discharges all sorts of actions, rights titles, conditions before or after breach, executions, appeals covenants. (1 Denio, 261 ; Moore, Exr. vs. Brown, 14 Mo., 165.)

I am of the opinion that the County Court had jurisdiction.

The judgment of the Circuit Court is reversed and the cause remanded.

Judges Adams and Vories concur.

Judge Wagner absent, Judge Sherwood not sitting.

—o—

**MARY CUMMINGS, Plaintiff in Error, vs. MARION CUMMINGS,
Defendant in Error.**

1. *Dower*—\$400 worth of personal property widows' absolutely.—The four hundred dollars worth of personal property to which the widow is entitled under the administration law. (W. S. 88, § 35), is hers absolutely ; is part of her dower and does not depend on her election.
2. *Dower*—Widow, application of for \$400 worth personal property—*Sale of property*—*Claim of widow on proceeds*.—There is no formality about—

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the application of the widow to the \$400 worth of personal property to which she is entitled under the administration act. (W. S. 88, §35.) It need not be in writing. After its sale she will still be entitled to \$400 of the proceeds, provided she makes her application prior to its distribution or payment for debt. The words "appraised value," used in that section, were only designed as a means of valuation in case the widow chose specific articles.

3. *Dower—Personal property—Notes and bonds.*—The "personal property" to which the widow is entitled under the administration law (W. S., 88, § 35) includes notes and bonds as well as property of the description ordinarily sold at administrators' sale.

Error to Cass County Circuit Court.

Terrill & Matthews, for Plaintiff in Error.

Notes, bonds and bills are such personal property as the law (W. S., 88, § 35,) contemplates in giving a widow four hundred dollars out of the personal property belonging to the estate of her deceased husband.

Johnson & Botsford, attorneys for Defendant in Error.

I. In allowing the widow to choose the additional personal property not exceeding the appraised value of \$400, the statute (W. S., 88, § 35) obviously contemplates *choses in possession*, but not *choses in action*.

II. The terms of the statute, "appraised value" plainly exclude *choses in action* not susceptible of an accurate appraisal. The intention of the legislature was to allow the widow to retain such articles of personal property as might be of peculiar value to her. The construction of section 35, which limits the same to choses in possession, finds support in section 36, which provides for the choice being made before the personal property is "distributed or sold." This language could not have any application to choses in action, which under the administration law are never "distributed or sold," but which must be sued upon by the administrator and him alone.

III. The application was defective in not specifying the particular personal property she had chosen, even if she was entitled to the allowance claimed out of choses in action. While the widows' right under section 35, to personal prop-

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erty to the appraised value of \$400, is not dependent on an election by her. (*Hastings vs. Myers*, 'Adm'r., 21 Mo., 519) yet in the absence of such election she cannot receive specific articles of property, but will receive the amount in money. (1 W. S., 88, § 37.)

SHERWOOD, Judge, delivered the opinion of the Court.

This was an application by Mary Cummings, widow of James Cummings, deceased, "for personal property of said estate to the amount of four hundred dollars." On the hearing of the application by the Common Pleas Court of Cass County, (a court possessed of probate jurisdiction), it appeared in evidence that there was then of the estate of the decedent, notes, money, etc., in excess of \$3,000, including the promissory note of the administrator himself, which, inclusive of interest, amounted to over the sum of \$700. It was also shown by the sale bill, that the personal property had been sold for \$140 60. This was all the testimony. The court refused to grant the application, and after moving unsuccessfully for a new trial, the applicant carried the case by writ of error, to the Circuit Court of Cass County, where the judgment of the Common Pleas Court being affirmed, she brings her case here by writ of error.

The application in this case is based upon §§ 35, 36, and 37, p. 88, Vol. 1 W. S., which are identical, save as to amount, with §§ 30, 31 and 32, of the administration law of 1845, under which it was held by this court in *Hastings vs. Myers*, Administrator, 21 Mo., 519, that the right of the widow to \$200 worth of personal property, was *absolute*, did not depend upon her election, vested immediately upon the death of her husband; was part of her dower, expressly made so by law, and in case the personal property of the estate was converted into money, and the widow died without receiving her portion of \$200, her administrator would be entitled to receive such money against creditors of her husband's estate.

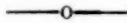
There is no formality about the application, nor need it be in writing, nor will it be construed with technical nicety. It,

however, the application be not made until after sale of the property, the court must order the money arising from the sale, to be paid to the applicant. And the right of the widow will not be at all affected, because she applies for personal property after the same has been converted into money, provided she make her application prior to its distribution or payment for debt. The words "appraised value," in § 35, *supra.*, were only designed as a means of valuation, in case the widow chose specific articles.

It has been urged here in argument that the term "personal property," employed in the last named section did not embrace choses in action, but merely property of that description which is ordinarily, the subject of administration sale; but that term is of a much wider signification. (2 Bouv. L. Dict., 394).

The law favors uniformity. The legislature certainly never intended that the widow's right in this regard, should depend upon the accident of her husband's dying possessed of horses or cattle, instead of notes and bonds. But the act in question is too plain for further comment; *perspicua vera non sunt probanda.*

The judgment is reversed and the cause remanded to the Common Pleas Court of Cass county. The other judges concur.



JACOB FUDGE, Administrator of the estate of JOSEPH JEWELL,
Defendant in Error, vs. JAMES DURN *et al.*, Plaintiffs in
Error.

1. *Administrator — Care required of.*—An administrator is not an insurer of the property of the decedent. He is liable for loss thereof, only where he fails to exercise that care and diligence which a prudent man would exercise in the management of his own property.

Error to Cass County Circuit Court.

Johnson & Bottsford, for Plaintiffs in Error.

- I. This administrator had given bonds to "pay and deliver

Fudge v. Durn, et al.,

all money of said estate," and notwithstanding the decision in State *ex rel.*, Townshend vs. Meagher, *et al.*, 44 Mo., 356. We submit that, under the terms of his bond (1 W. S., p. 73, §§ 17, 18,) he is bound to higher responsibility than an ordinary bailee, and cannot discharge such liability, by showing that the money was stolen. (Boyden vs. United States, 13 Wall., 17; Bevans vs. United States, *id.*, 56; United States vs. Prescott, 3 How., 578; United States vs. Keebler, 9 Wall., 83; United States vs. Dashiell, 4 Wall., 182; Commonwealth vs. Comly, 3 Penn. St., 372; Muzzy vs. Shattuck, *et al.*, 1 Denio, 233; Halbert vs. The State, 22 Ind., 125; Thompson vs. Board of Trustees, 30 Ills., 99.)

II. But this administrator did not exercise the care, skill and diligence required of a bailee for hire. The money came in his possession in the fall of 1860, and when he saw the disturbed condition of the country coming on, the following spring and summer, it was carelessness and negligence to keep this amount of money in a bureau drawer at a country residence. He could have deposited the same at some place beyond the impending and apparent danger, and it was negligence not to do so. (State, *ex rel.*, Townshend vs. Meagher, *supra*; Tracy vs. Wood, 3 Mass. C. C., 132; 2 Williams on Executors, 1636, to 1648; Foster, *et al.*, vs. Davis, 46 Mo., 268.)

III. The judgment of the Circuit Court was clearly erroneous in not allowing interest on the amount found due, at least from the date of the final settlement of the administration. (Foster, *et al.*, vs. Davis, 46 Mo., 271.)

Bogges & Sloan, for Defendant in Error.

I. Defendant in Error was rightfully allowed credit by the voucher numbered 17, for \$444.00. The testimony shows that Defendant in Error took the best care of the estate that he could do, under the circumstances. The facts, in this case, are materially different from those in the cases reported in 44 Mo., page 356 and 46 Mo., page 263. The facts in this case bring this party clearly within the rule there stated, as exempting persons holding fiduciary relations to money or property from liability.

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ADAMS, Judge, delivered the opinion of the court

This cause originated in the Common Pleas Court of Cass county, upon an application by the plaintiff as administrator of the estate of Jewel, deceased, to make a final settlement for the purpose of resigning his letters of administration.

The administrator notified the distributees, who were the only parties interested, and appeared and filed written objections to his report, and objected to all the vouchers except No. 17, which was for \$444.00 alleged in the report to have been lost by robbery. But notwithstanding there was no specific objection to this voucher, the Common Pleas Court acting as a Probate Court, refused to allow it as a credit, and the plaintiff excepted."

That court also refused to allow two or three other items for which credit, was asked. These credits were disallowed upon the alleged ground, that the administrator had not used due diligence in the collection of the debts constituting the vouchers. The Common Pleas Court found a balance against the administrator, of \$807.32-100, which included the \$400.00 above referred to.

The plaintiff took the case to the Circuit Court of Cass County by writ of error.

The law establishing the Common Pleas in Cass County, gives it probate jurisdiction, and authorizes writs of error from the Circuit Court. The Circuit Court on examination of the record from the Common Pleas, reversed the judgment, and proceeded to enter judgment for the amount of the Common Pleas judgment, less the \$400.00.

The bill of exceptions filed in the Common Pleas Court clearly shows that the \$400.00 was kept by the plaintiff at his dwelling house as the money of the estate, and that he was robbed of it by some of Jennison's men from Kansas, during the early part of the war.

The plaintiff himself swore to the robbery, and that it was as safe in his house as it would have been any where in that region of county. This evidence uncontradicted, entitled the plaintiff in my opinion to a credit for this amount.

He was not an insurer in any sense of the word. He was a trustee acting for the benefit of others. Chancellor Kent in *Thompson vs. Brown*, 4 Johns, Ch. Rep., 619 says "This court has always treated trustees acting in good faith with great tenderness." Lord Hardwick in *Knight vs. The Earl of Plymouth*, 3 Atk., 480, Dickens 120, said: "If there was no *mala fides*, nothing willful in the conduct of the trustee, the court will always favor him. For as a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of anxiety and trouble, it is an act of kindness in any one to accept it. To add hazard or risk to that trouble and to subject a trustee to losses which he could not foresee, would be a manifest hardship; and would deter every one from accepting so necessary an office."

Our own court followed this rule in *State, ex rel. Townshend Admr. vs. Meagher, et al.*, (44 Mo., 356,) which was a suit on an Administrator's bond, and is very much in point; (see also *Foster, et al., vs. Davis*, 46 Mo., 268 to the same effect.)

The learned counsel for defendant ask us to review these decisions and refers in support of their views to *Boyden vs. United States*, 13 Wall., 17, and many other cases previously decided by that court to the same effect.

The cases referred to, were on official bonds given by receivers, &c., of public moneys in which that court holds that such officers are in the nature of insurers, and must account for all moneys coming to their hands, no matter how safely kept, and that robbery, theft, &c., are no defense, and other authorities are referred to in some of the states maintaining the same doctrine. It is unnecessary to review these authorities as they do not touch the question before this court; as this is not the case of a public officer, we refrain from expressing any opinion in regard to what the law is in such a case. It is sufficient to say that we regard this as a private trust, that we look upon the administrator as the representative of the deceased—and if the deceased if alive and acting as a prudent man could not have prevented the loss, his representative ought to be exonerated under the like circumstances. There are other items in the administrator's

Forrester, et al., v. Scoville et al.,

account which I am not satisfied, were properly rejected, but we cannot look into them as the plaintiff does not complain. Besides the defendant asks that interest be allowed on the amount, found by the Circuit Court.

Upon the whole case, I think the judgment of the Circuit Court must stand.

Judgment affirmed. The other Judges concur.

—o—

EMOGENE E. FORRESTER, *et al.*, Defendant in Error, *vs.* B. C SCOVILLE, *et al.*, Plaintiff in Error

1. *Equity—Suit to divest title—Character of proof required.*—In an action in the nature of a suit in chancery, to divest defendant of his title to certain lands, the evidence in order to warrant a decree in favor of plaintiff must be so clear, definite, and positive, as to leave no reasonable ground for hesitancy in the mind of the Chancellor.

Error to Lafayette Common Pleas Court.

Wallace and Mitchell, for Plaintiff in Error.

Geeene and Rathbone, and John H. Beatty, for Defendant in Error.

SHERWOOD, Judge, delivered the opinion of the court.

This action is in the nature of a suit in chancery, brought by plaintiff to divest defendant of title to Lot 4, Block 41, in the first addition to the City of Lexington, and vest the same in said Emogene E. Forrester, by whom the plaintiffs claim the money was furnished with which said lot was bought.

Upon issues submitted to a jury, embracing the facts as to the ownership of the money, a verdict was had in favor of plaintiffs, and thereupon the Court entered a decree as prayed in the petition.

I have examined with care the testimony in the cause and am satisfied from such examination, that the evidence greatly preponderates in favor of the defendant, and fully supports the denial contained in his answer, that the plaintiff, Emogene E. Forrester, was the owner of the purchase money expended for the lot in question.

Wright v. Baldwin.

But even had the testimony preponderated on the side of the plaintiffs, it would not have been sufficient to have warranted a decree in their favor, unless of a character so clear, definite and positive, as to leave no room or reasonable ground for hesitancy in the mind of the Chancellor, as to the ownership of the money. (*Johnson et al.*, vs. *Quarles et al.* 46 Mo., 423, and cases cited.)

The Decree of the Court below is reversed, and the petition dismissed. Judge Vories not sitting. The other Judges concur.

F. P. WRIGHT, Appellant, vs. JOHN A. BALDWIN, Respondent.

1. *Principal and agent—Action by attorney against agent based on false representations—Measure of damages, etc.*—Where an agent of a bank, by means of false representations as to his authority to employ attorneys for his principal, secured professional services for the bank in sundry attachment proceedings; and on suit brought against the bank by the attorney for the value of his services, it turned out that the agent had no such authority as represented, and so the bank could not be made responsible.

Held, That the attorney had his action against the agent personally for the value of his services.

And that his petition would not be held bad on demurrer for misjoinder, because it included counts for services in the different attachment suits; said suits appearing to have been brought under the same employment:

And the measure of his damages would be the reasonable value of his services as attorney, together with the actual amount of his costs incurred in the suit against the bank.

Appeal from Benton Circuit Court.

F. P. Wright, for Appellant, cited in argument, *Smout vs. Ilbury*, 10 M. W. 8-10; *Sto. Ag.*, 264. *Randell et al.*, vs. *Trimen* 37. *English Law and Equity Reports*, 273.

SHERWOOD, Judge, delivered the opinion of the court.

F. P. Wright brought his suit in the Circuit Court of Benton County, against John A. Baldwin, to recover the value of legal services rendered by plaintiff as attorney, to the Mechanics Bank, under the employ of defendant, while the latter was acting as Agent of the Bank, and also to recover the costs

of a suit, which plaintiff unsuccessfully brought against said Bank for said fees, in consequence of the covin of defendants.

The petition in substance, charges that defendant was the agent of the bank, to make collections and to settle and adjust the business of its branch at Warsaw, at a stipulated compensation, and by his agreement with the bank was to employ the necessary attorneys at his own expense; that it became necessary for him in so doing to employ an attorney to institute two attachment suits in favor of the bank, against non-resident debtors of the bank; that defendant in order to induce plaintiff to institute and prosecute these suits, fraudulently and deceitfully held out to plaintiff, and induced him to believe that, as agent of the Bank, he had full authority to employ plaintiff to institute and prosecute said suits, and that the Bank would pay a reasonable compensation therefor; and fraudulently withheld from plaintiff, that he had no authority to render the Bank liable for the expenses incurred; that plaintiff was thus induced to institute and prosecute these attachment suits, which he did to the full extent of his employment, rendering services to the amount and value, etc.; that in a subsequent suit between the plaintiff and the Bank, in which the liability of the Bank for these legal services was in issue, the defendant upon oath, stated that he had no authority to render the Bank liable, and in consequence, judgment was rendered against plaintiff, and against him for costs, and that plaintiff then for the first time learned that the Bank was not liable. The petition concludes with a prayer for judgment for the above mentioned amount, and the costs adjudged against plaintiff in his suit against the Bank.

The defendant demurred to the petition on two grounds:—

First: That the petition did not state facts sufficient to constitute a cause of action.

Second: That two causes of action had been improperly joined.

The petition was adjudged insufficient, and the plaintiff refusing to amend, judgment was given on the demurrer: from which judgment the plaintiff appealed to this Court.

Does this petition state facts sufficient to constitute a cause of action. And is there a misjoinder of two causes of action? are the only questions presented by this record for consideration. In *Randell vs. Trimen*, 37 Eng. Law, and Eq., 275, the declaration stated that the defendant who was employed as Architect by A. and others, to superintend the building of a church, falsely and fraudulently represented and pretended, that he was authorized by A. to order, and did order stone of the plaintiffs for the building of said church, for, and on account of, and to be charged to A., and that the plaintiff relying on that representation and believing that the defendant had authority from A. to order the stone, on his account delivered the same, and the same was used in the building of a church. Whereas, in truth and in fact, the defendant was not, as he well knew, authorized so to order said stone.

It then went on to aver, that A. refusing to pay for the stone, the plaintiffs trusting in the defendant's representations sued A. for the price and failed in their action, and had to pay A's costs, and also the costs incurred by their own attorneys.

There were other counts in the declaration for goods sold and delivered, money had and received, etc., but in the first count, were embraced all the items as there enumerated, and upon that count the plaintiff had a verdict, and the court held:—

That the declaration sufficiently disclosed a cause of action; and, it appearing that the defendant had no such authority as he represented; that the plaintiffs were entitled to recover not only the value of the stone, but also the costs incurred in the former action. And the Court in delivering the opinion in that case refers to that of *Smout vs. Ilbury*, 10 M. & W. 1; where it is held that agents are responsible in three classes of cases:—

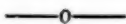
1. Where the agent makes a fraudulent representation of his authority with intent to deceive.
2. Where he has no authority and knows it, but nevertheless makes the contract as having such authority.
3. Where not having, in fact, authority to make this con-

tract as agent, he yet does so under the *bona fide* belief that such authority is vested in him, as in the case of an agent acting under a forged power of attorney, which he believes to be genuine and the like.

In *Newton vs. Miller, et al.*, 49 Mo., 298, where an agent brought suit against his principals and his petition set out several distinct items, and claimed judgment for each, the Court held that as the petition "*was founded on matter growing out of the same alleged agency,*" it might be treated as one count.

In the case now under discussion, although *two* suits were brought by the attorney, yet this was done under *one and the same employment*, and as a matter of course, it constituted but *one* cause of action, even when coupled with the costs which plaintiff incurred in his suit against the Bank. The basis and gist of plaintiff's action being the *loss* and *damages* which he has suffered, by means of the fraudulent representations of defendant; and upon this ground the Court places the right of recovery in *Randall, et al. vs. Trimen, supra*. And the measure of plaintiff's damages will be the reasonable worth of his services as attorney, as well as the actual amount of his costs, incurred in his suit against the Bank.

The judgment is reversed and the cause remanded. The other judges concur.



WASHINGTON SAVINGS BANK, Appellant, vs. REZIN B. ECKY,
Respondent.

1. *Bill and notes—Forged insertion of rate of interest by payee—Effect of.—*

A forged insertion of rate of interest in a negotiable promissory note by the payee, will not impair the liability of a subsequent indorser to an innocent holder for value, before maturity, but will discharge the maker.

Appeal from Franklin Circuit Court.

Flannagan with Halligan, for Appellant.

I. The note was endorsed to the plaintiff before maturity,

and even though the words "ten" and "date" were added without the knowledge or consent of the defendants still they are liable; for the plaintiff was an innocent holder for value. (*Isnard vs. Torres*, 10 Louis, An., 103., *Visscher vs. Webster* 8 Cal., 109.)

II. The question presented by this case has recently been before the courts of Pennsylvania, Illinois and Iowa; and whatever may be urged against the decision in the Pennsylvania and Iowa cases, they are certainly sanctioned by principle and authority. (*Garrard vs. Haddan*, 67 Penn. St., 82; *Id.*, 59; *McDonald vs. The Muscatine Nat. Bk.*, 27 Iowa, 319.)

Seay & Kiskaddon, for Respondent.

I. Any alteration in a bill or note, will render such bill or note invalid as against a party not consenting to such alteration, even in the hands of an innocent holder. (*Trigg vs. Taylor*, 27 Mo., 245; *Ivory vs. Michael*, 33 Mo., 398; *Presbury vs. Michael*, *Id.* 542; *Woodworth vs. Bank of America*, 19 Johns., 391; *Nazro vs. Fuller*, 24 Wend., 374; *Bruce vs. Wescott*, 3 Barb. 374; *Hall vs. Fuller*, 5 Barn. and Cress., 750; *Haskell vs. Champion*, 30 Mo., 136; *Duker vs. Franz*, 7 Ky. (Bush.) 273, 1 Greenl. on Ev. § 565.)

II. The holder of a note has no right to make an alteration to correct a mistake. (*Ibid.*)

And a surety is discharged by an alteration before the delivery of the note. (*Britton vs. Dierker*, 46 Mo., 591.)

And an alteration in the date of commercial paper, although the alteration delay the payment, is a material alteration, and if not made with the consent of the party sought to be charged, extinguishes his liability. (*Wood vs. Steele*, 6 Wall., 80; *Hall vs. Fuller*, 5 B. & C., 750; 30 Mo., 137; 33 Mo., 398.)

ADAMS, Judge, delivered the opinion of the court.

The only question presented by this record is, whether the maker of a negotiable note is bound to pay the same in the hands of an innocent holder who took a transfer of the same for value before maturity, where such note, after being execu-

ted, was altered so as to bear ten per cent. per annum interest from the date, when it was the agreement of the parties that it should bear no interest? The note was for fifty dollars, and was a printed form, filled up properly in all the blanks, except the spaces for the rate of interest and date of interest were left blank, but with the express understanding that the note was to bear no interest. Notwithstanding this was the agreement of the makers and payee, the payee, after the execution and delivery of the note, and without the knowledge or consent of the makers, altered the note by inserting in the spaces left the words "ten" and "*date*," so as to make the note read ten per cent. per annum. There was nothing on the face of the note to indicate that it had been altered. That this was a forgery and avoided the note in the hands of the payee, there can be no dispute. The authorities are all agreed that such an alteration of a written contract by a party to it, without the consent of the maker, renders it absolutely void. The only question is whether this rule applies to commercial paper purchased in the usual course of trade by an innocent holder for value before maturity.

There is much conflict in the authorities on this point, both in England and America, so much so that it is useless to try to reconcile them, and I shall not undertake to review them here. The tendency of the decisions of this court, is that such a forgery avoids the note, not only as between the original parties, but as to innocent holders for value. See *Trigg vs. Taylor*, 27 Mo., 245; *Haskell vs. Champion*, 30 Mo., 136; *Ivory vs. Michael*, 33 Mo., 398; *Presbury vs. Michael*, 33 Mo., 542; *Briggs vs. Ewart*, *ante p.*, 245.

I maintain that this rule is supported by the weight of reason, if not of authority.

Why should the holder be allowed to recover on forged commercial paper? It is urged that to prohibit a recovery in such case would impede its circulation. But there need be no unnecessary delay created by this rule. In all cases the purchaser of such paper must be satisfied that his indorser has the title. He ought also to satisfy himself that he is honest, or if not honest, that he is a responsible indorser.

The indorser guarantees the genuineness of the paper, and if the paper be forged, he is nevertheless responsible as indorser.

The insertion of the ten per cent. interest from date, was a complete forgery, and, in my opinion, rendered the note void in the hands of the plaintiff.

Judgment affirmed. The other judges concur.

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GEO. W. KOONTZ and L. E. KOONTZ, his wife, Defendant in Error, *vs.* THE CENTRAL NATIONAL BANK OF BOONEVILLE, Mo., Plaintiff in Error.

1. *Agency—Bills and notes—Draft—Money paid collector by mistake—Collector liable, when.*—A draft drawn by A. upon B., by inadvertence of the collector, was presented to C., and paid by him, under a mistaken impression as to his liability, and remitted to A. by the collector before the mistake was discovered. *Held*, that as the money was paid by C. and received by the collector under a mutual mistake as to the facts, the latter would be liable to the former in an action for money paid. In such case, it makes no difference that plaintiff had the means of knowing of the error, and might by diligence and care have avoided the payment.

Error to the Cooper County Circuit Court.

Draffen & Muir, for Plaintiff in Error.

I. This is a suit for money had and received, and before the defendants in error can recover they must show an *express* promise on the part of the plaintiff in error to pay, or such a state of facts as that the law will imply one.

II. Where money is paid to a known agent, although by mistake, the action ought to be brought against the principal, and it will not lie against the agent, except after notice, or where he has acted *mala fide*; the rule being *respondeat superior* in such cases.

McMillan Brothers, for Defendants in Error.

I. In this case the money was paid under a mistake of facts; and it is no defense that the defendant in error, Mrs. Koontz,

had within her reach the means of ascertaining the truth, or that she omitted to use vigilance and care by which the mistake would have been avoided. (Marriot vs. Hampton, 2 Smith's Lead. Cas., 5th Am. Ed., 400; Kingston Bank vs. Eltinge, 40 N. Y., 391; Union Bank of Troy vs. Sixth National Bank of N. Y., 43 N. Y., 452; Citizens' Bank of Baltimore vs. Graffion, 1 Am. Rep. 66; 31 Maryland, 507; Kelly vs. Solari, 9 M. & W., 54; B. & S. R. R. Co. vs. Farmer & Passmoor, 6 Gill, 68.)

II. The rule is that money paid under mistake of fact can be recovered by the payer from the receiver, and it is no defense that he received it as agent, and has paid it over to his principal. (Kingston Bank vs. Eltinge, 40 N. Y., 399; Bank of Commerce vs. Union Bank, 3 Com., 230; Canal Bank vs. Bank of Albany, 1 Hill, 287; Rheel vs. Hicks, 25 N. Y., 289.)

III. In this case, if the plaintiff in error was the agent of the Second National Bank of St. Louis, at all, it was the agent to collect said draft of Mrs. M. A. Simpson and remit the collection, and for no other purpose; the plaintiff in error was not authorized by the Second National Bank, either by said draft or otherwise, to collect the same from defendant in error, Mrs. Koontz. The act of plaintiff in error, in collecting said draft of Mrs. Koontz, when it was drawn on Mrs. Simpson, was its own act, for which it alone is responsible. (Sto. Ag., §§ 68, 76, 83; Paley on Agency, 102; 38 Mo., 228, 245; 46 Mo., 186; 47 Mo., 181; 1 Pars. on Notes and Bills, pages 105, 119.)

IV. It is no defense that plaintiff in error cannot be restored to his original position upon paying back the money. The rule is that where one of two must lose, the party having the legal right must prevail. (Kingston Bank vs. Eltinge, 40 N. Y., 399, 400; Rheel vs. Hicks, 25 N. Y., 289.)

V. It is no defense that Mrs. Simpson became insolvent after said draft was accepted and paid, and before plaintiff in error was notified. Defendant in error was duly diligent in notifying plaintiff in error of the mistake, having notified defendant in error as soon as said mistake was discovered. (Rheel vs. Hicks, 25 N. Y., 289 above cited; Union Bank vs. U. S. Bank, 3 Mass., 75.)

WAGNER, Judge, delivered the opinion of the court.

This case was tried in the court below on an agreed statement, and the material facts are, that prior to July 1870, Mrs. Koontz was engaged in selling millinery goods in the city of Booneville, and at the same time Mrs. Simpson was also engaged in the same kind of business.

Both of them were customers of C. H. Tuttle of St. Louis, who was in the habit, from time to time, of drawing drafts on each of them for amounts due on their purchases, which drafts were sent to the Second National Bank of St. Louis, for collection, and were collected and remitted. On the 7th day of July, 1870, Tuttle drew the draft out of which this controversy arose, on Mrs. Simpson for \$100.00. The collecting officer of defendant by inadvertence and mistake, presented it to Mrs. Koontz instead of Mrs. Simpson, and Mrs. Koontz under the impression at the time that she was indebted to Tuttle and that the draft was drawn on her, paid the money and took up the draft. On the same day, defendant remitted the money to the Second National Bank, stating that the collection was on account of Mrs. Koontz. At this time, Mrs. Koontz and Mrs. Simpson were both solvent.

No notice was given to the defendant of the error until the 1st of December, 1870, being after the defendant had remitted the money to Tuttle, and after Mrs. Simpson had become insolvent. The court decided as matter of law, on the agreed facts, that defendant was liable to pay the money, and accordingly gave judgment for the plaintiff. It is now alleged for error that the defendant was the mere agent of Tuttle for the collection of the money, and as it paid the same over to its principal before the discovery of the mistake, it cannot be held liable. The general rule undoubtedly is, that if a party, who pays money to an agent for the use of his principal, becomes entitled to recall it, he may, upon notice to the agent, recall it, provided the agent has not paid it over to his principal, and also provided no change has taken place in the situa-

tion of the agent since the payment to him, before such notice. Therefore, if the money has been paid over to the principal before notice of recall, the agent will not be liable, unless indeed, the receipt of the money by the agent was obviously fraudulent and illegal, or his authority to receive it was known to himself to be void. (Sto. Ag., § 300.)

But there is a large class of cases, and this appears to be one of them, in reference to the responsibility of agents, that does not come within the rule above announced. This is a case of mutual mistake, and it makes no difference that the plaintiff when she paid the draft, had the means of knowing, and might by diligence and care have avoided the payment. It is held that it is no bar to an action, that the party paying had the means of knowing, and might have availed himself, of those means by care and attention, and thus have arrived at exact knowledge. (*Waite vs. Leggett*, 8 Cow., 195.) "Care and diligence" says Hunt, Ch. J., in a case involving precisely the question here in controversy, "are not controlling elements in the case." It is a question of fact merely. The inquiry is, are the parties mutually in error, and did they act upon such mutual mistake? Was there or not, an error between the parties? And the determination of the fact controls the result. (*The Kingston Bank vs. Etlinge*, 40 N. Y., 391.)

If the money is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying had been in omitting to use due diligence to inquire into the facts. (*Kelly vs. Solari*, 9 M. & W., 54; *Marriot vs. Hampton*, 2 Sm. Lead. Cas., 403, notes.) The imputation of negligence would not bar the plaintiff's action.

In the *Canal Bank vs. Bank of Albany*, (1 Hill, 287,) which was an action by one bank to recover from the other, the amount of a draft paid to it upon a forged indorsement of the name of the payee, the plaintiff recovered as for money paid by mistake, and it was held no defense to show that the defendant had collected the money as the agent of another bank, in the city of New York, and had in good faith, and without notice, paid over the money to its principal.

Here a loss was inevitable to the defendant or its principal, and it was impossible to restore them to the position of the holder of an immature and unprotected draft.

They were nevertheless held liable.

The court in the opinion says: "The conduct of both parties was *bona fide*, and the negligence or rather misfortune of both the same. It was the duty, or more properly, a measure of prudence in each to have inquired into the forgery, which both omitted."

But this raises no preference at law or equity in favor of the defendants, but against them. They have obtained the plaintiff's money without consideration, not as a gift, but under a mistake. For the very reason that the parties are equally innocent, the plaintiffs have the right to recover. The same principle is laid down in the same manner in the *Bank of Commerce vs. Union Bank*, (3 Comst., 230.) There the Union Bank had paid to its correspondent in New Orleans, the money received from the plaintiff.

In the case of *Rheel vs. Hicks*, (25 N. Y., 289,) a complaint had been made against the plaintiff that he was the father of a bastard child, of which one Louisa Hepe was pregnant, and upon the oath of the said Louisa, the plaintiff was arrested, and compromised the matter with the superintendent of the poor by paying him the sum of fifty dollars in consideration of a full settlement, and release for the child's support. It turned out that the complainant was not pregnant with a child by any one, and that she was not delivered of the child at all. The plaintiff brought his action against the defendant to recover back the money, and succeeded. The court held that the fact that he had paid over the money to the county, did not alter the case, although it was his duty so to pay over all moneys received for the support of bastards.

In *Kingston Bank vs. Eltinge*, *ubi supra* in passing upon this question, the court say, "One party or the other being compelled to lose, the question is, which shall it be. The answer given by the authorities is, that the party having the legal right must prevail.

Many other cases might be adduced to the same effect, but it is unnecessary.

It is apparent that the parties acted under a mistake of fact, and that both were mutually in error, and if, in consequence of such mutual mistake, one party has received the property of the other, he must refund; and this without reference to vigilance or negligence. As the draft was wrongfully presented to the plaintiff, and it was paid by reason of a mutual mistake. I think that she is entitled to recover, and that the judgment of the court below should be affirmed.



JOSEPH FINK, Plaintiff in Error *vs.* MARY HANEGAN, Defendant in Error.

1. *Mechanic's lien—Married woman—Husband made co-defendant, when.*—
In suit to enforce a mechanics' lien against the property of a married woman, the husband must be joined as defendant. (Latshaw vs. Mc'Nees, 50 Mo., 381.)

Error to Cole Circuit Court.

George T. White, for Plaintiff in Error.

The Circuit Court in sustaining the demurrer, disregarded the 8th section of chapter 161, page 151, of the General Statutes, which authorizes actions concerning the separate property of the wife to be prosecuted against her alone. And the session acts of 1868, p. 87, gives her the right to defend by attorney and to be sued alone when she is defendant only. (Claffin vs. Van Waggoner, 32 Mo., 252; St. Louis, etc. vs. Bernoudy, *et al.*, 43 Mo., 554-5.)

There is no question about her right to make a contract that will be the basis of a mechanics' lien. (Collins vs. Megraw, *et al.*, 47 Mo., 497, and authorities cited; Burgwald vs. Weipert, 49 Mo., 60.)

Lay & Belch, for Defendant in Error.

Defendant was at the time of the alleged contract, and at the time of the institution of the suit, a *feme covert*. She could

not have been sued alone in the absence of a statutory power, but our statute expressly provides that when a married woman is a party, her husband must be joined with her in all actions, except when, &c. (W. S., 1001, § 8.)

The statute in relation to liens makes no provision for the enforcement of this legal or statutory remedy against the property of a married woman.

The only proceeding to subject separate property of married women, is a proceeding in equity ; this legal remedy cannot by any analogy be applied and enforced.

ADAMS, Judge, delivered the opinion of the court.

This was an action to enforce a mechanics lien. The defendant, who is the owner of the property, is a married woman, as appears from the petition, and her husband is not joined as a party defendant.

This point is raised by a demurrer to the petition, which was sustained, and is the only question presented for our consideration.

A married woman is not *sui juris* and could not be sued at common law without joining her husband. It was necessary to bring him before the court to protect her interests. Our practice act as amended in 1868 (W. S., 1001, § 8.) is only declaratory of the common law and requires that "when a married woman is a party her husband must be joined with her in all actions except those in which the husband is plaintiff only, and the wife is defendant only, or the wife plaintiff and the husband defendant."

An action under the mechanics lien law is no exception to this rule. This point was expressly decided by this court in *Latshaw, et al., vs. McNees*, 50 Mo., 381

Let the judgment be affirmed.

JOSHUA ROBERTS, Respondent, *vs.* HENRY MOSELEY and JOHN
MOSELEY, Appellants.

1. *Trusts—How may be accepted by trustee, etc.*—When a trust deed contains no covenants to be made and executed by the trustee, it is unnecessary that he should join in the execution of the deed, in order to manifest his intention to accept the appointment. Any act on his part by which he manifests an intent to acquire or exercise any influence in the management of the trust property, will be sufficient. The fact that the trustee shortly after the execution of the trust deed, rented out the trust property, and that when he died the deed was found among his papers, is a strong circumstance from which to deduce an acceptance.
2. *Use and trust—Property conveyed to separate use of married woman—Death of trustee—Estate vests, how.*—When land is conveyed to a trustee for the sole use and benefit of a married woman, upon his death, the use is immediately executed in her, and if she be dead, then in her legal heirs.

Appeal from Newton Circuit Court.

A. H. Dale, for Appellant.

1. Any act by which the person named as trustee, manifests an intent to acquire or exercise any influence in the management of the trust property, will tend to fix upon him the responsibilities of the trust. (Tiff. & Bull., *Trusts and Trustees*, 511; Hill on *Trustees*, 4th Am. Ed., 215; O'Neil vs. Henderson, 15 Ark., 235; Montford vs. Cadogan, 17 Ves., 488, and same parties 19 Ves., 638.) And certainly five years possession is sufficient. Armstrong's son and administrator testified, that he found among his father's papers, either the trust deed or a copy of it, which is another fact which tends to prove his acceptance, and further, if a trustee does not wish to accept the trust, he must disclaim. The presumption is that he accepts. (Tiff. & Bull., *Trusts and Trustees*, 510; 512; 524; 526; 527; 529; 532; and 533; Washb., on *Real Prop.*, 196; 5 Harris. Dig. 1736.) No disclaimer being proven, he will be deemed to be trustee and to have fully accepted the trust.

II. Under the deed of trust offered in evidence, as soon as the marriage relations between George W. Moseley and Ann M. Moseley came to an end, the estate of the trustee at once became executed either to the *cestui que trust* or heirs at law (2 Wash., *Real Prop.*, 188; Liptrot vs. Holmes, 1 Ga., 381;

Bush's Appeal, 33 Pa. St., 85; Steacy vs. Rice, 27 Penn. St., 75; Morgan vs. Moore, 3 Gray, 323.)

C. W. Thrasher, for Respondent.

The Circuit Court committed no error in excluding from the jury the trust deed from George W. Moseley to H. C. Armstrong.

In ejectment an equitable defense must be pleaded especially. Kennedy vs. Daniels, 20 Mo., 104.

The trust deed was not signed by H. C. Armstrong—nor was there any evidence offered that he ever interfered with the trust estate under the trust deed.

Armstrong was not obliged to become the trustee of Ann M. Moseley—and some assent by word or deed must be shown to make him such. (2 St. Eq. Juris., 4th Ed., § 106; 2 Washb. on Real Prop., 2nd Ed. 196, § 13.)

Even if H. C. Armstrong had accepted the trust, then under the terms of the trust deed, he held the legal title, and was entitled to possession of the trust estate, as against Ann M. Moseley and her heirs.

A trustee can only be divested of his right of possession of the trust estate, by his *cestui que trust* by a decree of a court of Equity (2 Washb. on Real Prop., 2nd Ed., 212, § 17.)

The legal title of a trust estate in a trustee passes to his heirs or grantees subject to the trust, if the purchaser has notice, (2 Wash. on Real Prop., 2nd Ed., 202, § 25.)

A trustee may maintain ejectment against his *cestui que trust*. (2 Washb. on Real Prop., 2nd Ed., 207, § 6.)

If H. C. Armstrong was trustee, and the title to the premises acquired by him from F. M. Crouch, inured to the benefit of appellants as heirs of Ann M. Moseley, *cestui que trust*, they could avail themselves of it only by a proper proceeding in Equity. It would not enable them to defeat the right of possession in the trustee or his grantees in ejectment. There is no merger of the legal and equitable estates in appellants, as heirs of Ann M. Moseley. Appellants are not entitled to the possession of the trust estate under the terms of trust deed.

In any view of the case, Respondent as the grantee of the widow and heirs of H. C. Armstrong, deceased, has the legal title and the right of possession of the premises, and is entitled to recover in this suit.

WAGNER, Judge, delivered the opinion of the court.

This action was an ejectment brought by the plaintiff against the defendants to recover certain real estate in Newton County.

From the record it appears that on the 26th day of July, 1853, one George W. Moseley, conveyed the premises in question, by deed, to H. C. Armstrong in trust, for the use and benefit of his wife, Ann M. Moseley, and her heirs forever. This deed was recorded on the same day it was executed.

On the 18th day of March, 1854, Shapleigh and Day obtained a judgment by confession against George W. Moseley, upon which execution was issued, and levied upon the property, conveyed to Armstrong in trust for Mrs. Moseley and her children, and at a sale made by the sheriff of the same, the property was purchased by one John R. Chenault, and he received a sheriff's deed therefor. Chenault and wife conveyed the premises to M. F. Crouch, by deed dated October 27, 1855, and in October, 1859, Crouch and wife by their deed, conveyed the same to H. C. Armstrong, the trustee designated in the deed of trust. In 1868, the widow and children of Armstrong conveyed the land to plaintiff, and this constitutes his claim of title.

At the commencement of this suit, George W. Moseley, Ann M. Moseley and H. C. Armstrong, were all dead. The defendants are the heirs of Ann M. Moseley, and are in possession.

In their answer, in addition to a denial of title in the plaintiff, the defendants set out the terms of the deed of trust and asserted that the legal title had devolved on them. This part of the answer, on motion of plaintiff, was stricken out. The jury, under instructions of the Court, found a verdict for the plaintiff, upon which judgment was rendered, and the defendants have appealed. After part of the answer was

stricken out, the court excluded from the consideration of the jury the deed from Moseley conveying the property in trust under which the defendants claim.

If this deed was valid, it passed the entire fee from Moseley, and as it was recorded prior to all the other conveyances under which the plaintiff seeks to derive title, it constitutes a title superior and paramount. It is now urged that as Armstrong never signed the deed, he was not a trustee, and the deed was for that reason inoperative.

The acceptance of the office of trustee may be proved by the declarations or other acts of the trustee. When the trust is created by deed, and the trustee intends to accept the appointment and execute the trust, the proper way to manifest that intention is to join in the execution of the deed. This is generally necessary where the instrument contains covenants to be made and executed by the trustee. But when the instrument contains nothing of the kind, joining in the deed is unnecessary, any act by which the trustee manifests an intent to acquire or exercise any influence in the management of the trust property, will tend to fix upon him the responsibilities of the trust. (Tiff. and Bul. on Trusts and Trustees, 510; Flint vs. Clinton Company, 12 N. H., 432; Leffler vs. Armstrong, 4 Iowa, 482; Christian vs. Yauncey, 2 Pat., and Heath, 240; O'Neil vs. Henderson, 15 Ark., 235.)

It has been held that, after a lapse of years, the acceptance of the trust by the trustee named in the instrument will be presumed, even where he had never executed the trust deed or done any act by which such an acceptance could be inferred. (*In re. Uniacke* 1, Jones and Lat. 1; *In re. Needham* *Id.*, 34.) But this presumption may be rebutted by a disclaimer.

The evidence in this case shows that Armstrong, the trustee, rented out the property shortly after the execution of the trust deed, and long before he pretended to acquire any title of his own, and that when he died the deed was found in his possession among his papers. These were strong circumstances from which to infer or deduce an acceptance, and should have been submitted as a question of fact. It was not necessary that the trustee should have executed the instrument,

for it did not require him to make any covenants or do anything in relation to the trust property. It contained a mere naked seizin, for the use of another.

But it is further insisted, that even if the estate vested in the trustee, when he died the legal title descended to his heirs, and that the defendants could only divest it, and obtain relief by a decree in equity. This assumption, I think, is founded in an entire mistake. Where a trustee is appointed to hold the estate of a married woman, to protect it from the husband, and the marriage relation comes to an end, his estate at once becomes executed in the person who is to take it, the wife, if living, or if she is dead, her heirs at law. (2 Washb., Real Prop., 3d Ed., 461, § 45.)

The Supreme Court of Georgia holds, "that on the death of a *feme covert*, intestate, her separate estate vests in her legal representative, and he can maintain trover therefor, even where there has been a trustee appointed for the purpose of protecting such property against the marriage rights of the husband, during the coverture; the trust being considered as executed whenever the coverture ceases to exist. The interest of the trustee in the property is determined by the coverture, when there is no other object to be accomplished by his appointment." (Liptrot vs. Holmes, 1 Ga., 381.) This we think is the established law. (Morgan vs. Moore, 3 Gray, 323; Steacy vs. Rice, 27 Penn. St., 75; Bush's Appeal 33, *Id.*, 85.) By the very term of our statute upon the execution of the deed, the seizin and possession of the premises were transferred to the beneficiaries. (2 W. S., 1350, § 1.)

The deed from George W. Moseley to Armstrong, as trustee, conveys the land "for the sole use and benefit of the said Ann M. Moseley, her heirs and assigns forever, and in further trust, that the said Ann. M. Moseley shall have the use and occupation of said lands, and take and enjoy the rents and profits of the same for her sole use and benefit."

Upon the death of George W. Moseley, the use thus created became immediately executed in Ann M. Moseley, and if she was dead, then in her legal heirs, and thus the whole legal estate was then vested in the *cestui que use* by virtue of the statute of uses. (1 Sand. on Uses, 4th Ed., 85, 98.)

The result is that the judgment must be reversed and the cause remanded. All the judges concurring.

Separate opinion by JUDGE ADAMS.

I concur in the result. If the plaintiff had any title, it was a mere legal estate and constituted him trustee for the defendants who are the beneficiaries, and as such, entitled to the possession as against the trustee.

The trustee's office is to protect the legal estate against strangers or trespassers. But both at law and in equity he must allow the beneficiaries to enjoy the property where such was the intention of the grantor creating the trust. The statute of Uses only carries the possession to the first use, and in deeds of bargain and sale, the deed itself at common law only created a use in favor of the bargainee, the legal title still remaining in the bargainer or grantor. And by the statute of Uses this legal title or possession was transferred to the use, and thus the whole title by the statute of Uses was transferred to the bargainee. But if a trust or second use was declared by the deed the statute did not operate on such second use. This second use became a trust which the bargainee as trustee was bound to protect.

My opinion, therefore, is that the defendants are still beneficiaries, and as such, entitled to the possession and enjoyment of the estate, and may in this suit, by way of answer or cross-bill, have the legal estate vested in them, as there is no longer any purpose for which it ought to be kept separate from an equitable estate.

Hall v. Bray.

C. L. HALL, Respondent, vs. N. BRAY, Appellant.

1. *Warranty, covenant of—Suit on—Eviction unnecessary, when.*—In a suit on a covenant of warranty where plaintiff holds by a title adverse to defendant, he will not be compelled to show an *eviction* in order to recover. If he prove that the title purchased was a good one and superior to his own, and that it was purchased at a fair and reasonable price, that is sufficient. The measure of damages in such a case is the amount paid for the outstanding title, if it does not exceed the price originally paid for the land.
2. *Constitution, special acts, when necessary,—Legislature must determine—Jasper County Common Pleas Court.*—The act creating the Common Pleas Court of Jasper county, (Sess. acts, 1869, p. 170,) is not in conflict with § 27, Art. 4 of the State Constitution by reason of being a special enactment. Whether such a court can be provided for by a "general law," is one to be determined by the legislature.

Appeal from Jasper Common Pleas Court.

N. Bray, pro se.

L. P. Cunningham & J. F. Hardin, for Appellant.

I. If a covenantee surrenders to one having a paramount title *after the person holding the paramount title has hostilely asserted the same*, he may maintain his action on the covenant in the deed but if he does so without actual eviction he takes on himself the burthen of proof that the covenantor at the date of the deed had no title, and this he must prove affirmatively. It is not enough that he show title in another person. (Rawle on Cov. of Title, 3d. Ed., § 249-50-51; *Id.*, 265; *More vs. Vail*, 17 Ill., 190; *Loomis vs. Bedell*, 11 N. H., 74; *Turner vs. Goodrich*, 26 Vt., 709; *Rawle on Cov. Tit.*, 228, 3d Ed.; *Funk vs. Creswell*, 5 Clark, Iowa, 89; *Patton vs. McFarlane*, 3 Penn., 419; *Dickson vs. Vories*, 7 Watts, L. S., 409.)

II. Plaintiff has purchased in what purports to be paramount title without being *disturbed*. "The title and the conveyants acquired are not disturbed by the mere existence of an outstanding paramount title, and he has no right to assume that it ever would be, until he actually feels the pressure upon him by a demand for possession, and a hostile assertion of that title."

III. That being the case the judgment of the court below must be reversed. (*More vs. Vail*, 17 Ill., 190; *Hannah vs. Henderson*, 4 Ind., 174; *Stewart vs. West*, 14 Penn. St., 338; *Beebe*,

vs. Swartwout, 3d Gilm., 179; Hagler vs. Simpson, 1 Busbee N. C., 386; Witty vs. Hightower 12 S. & M., 478; Burrus vs. Wilkinson, 31 Miss., 537.)

IV. In Kentucky it is held that the covenantee cannot hold the possession and sue on the covenant. He must place the covenantor where he found him if he intends to rely on the covenants in the deed. (Vanmeter vs. Griffith, 4 Dana, 97.)

V. The judgment in this case should be reversed. The petition does not state facts sufficient to constitute a cause of action. It is a well settled rule in pleading on a covenant in a deed for the sale of land, that an eviction must be averred (Chitty Plead., 543; Clark vs. McNulty; 3 Serg. & Rawle, 372; Paul vs. Witman, 3 W. & Serg., 410; Hannah vs. Henderson, 4 Ind., 174.) In this case it is not done according to any rule of pleading.

VI. This case cannot be sustained. The court in which the judgment was rendered had no jurisdiction over the defendant or the subject of the action. The act of the legislature of the State, constituting said court is unconstitutional and void, because it is not a general law, but is local and special in its nature and operation. A general law could have been made applicable to common pleas courts throughout the state. (§ 27, Art. 4, Const. of Mo.; Bacon's Ab. Vol. 9, 231; 3 Ind., 258; 4 Ind., 343; 5 Ind., 4 and *Id.* 557.)

VII. The act establishing the Common Pleas Court of Jasper county was affirmed on the 4th of March, 1869. (Sess. Acts, 1869, p. 170.) This act was amended and its powers largely increased by act of the General Assembly of the State, approved Feb. 1st, 1870. (Sess. Acts 1870, p. 197. See 4 Ind. 347-8; 5 Ind., 4.)

W. H. Phelps, for Respondent.

I. In an action on the covenant of seizin; it is not necessary to allege by way of breach an ouster or eviction. All that is necessary is to negative the words of the covenant. (Sedgw., Meas. Dam., 3d Ed., 181; 4 Kent Com., 479; Rawle on Cov., 53, 54, 55; 14 Johns. 248.)

II. Where the vendee has bought in an outstanding title,

the measure of damage is the amount paid for the title outstanding, if it does not exceed the purchase money paid by the vendee to the vendor. (*Lawless vs. Colier's Ex.*, 19 Mo., 480; *Collier vs. Gamble*, 10 Mo., 467.)

VORIES, Judge, delivered the opinion of the court.

This action was brought by Hall against Bray to recover damages for the breach of the covenant of seizin, created by the words "grant, bargain and sell," contained in a deed executed by Bray to Hall, the plaintiff, on the 4th day of February, 1868, conveying to Hall a tract or lot of land described as lot numbered ten, in the town of Carthage in Jasper county, Missouri.

The breach assigned in the petition is "that at the time of the execution and delivery of the deed, the defendant was not seized of an indefeasible estate in said lot; that one Ethelbert Bright held an outstanding and paramount title to the same;" that in order to the perfection of plaintiff's title he was compelled to and did buy in said outstanding title, for which he paid six hundred dollars.

Judgment was asked for four hundred dollars and interest, the amount charged to have been paid by the plaintiff to the defendant for the lot.

The answer admits the conveyance of the lot as stated in the petition, but denies that the defendant was not at the time the owner of the lot in fee simple; states that at the time of the conveyance he was in the possession of the lot; that he then put plaintiff into the peaceable and uninterrupted possession thereof; and that plaintiff, together with those holding under him, has continued in said possession, and that on the 7th day of October, 1868, plaintiff sold and conveyed said lot to one John A. Carter, who then entered into the possession of said lot under said purchase, and that plaintiff and those claiming under him, are still in the peaceable and uninterrupted possession of said lot, their possession and right having never been questioned. The answer also denies the title of Bright, or that any other person ever had or held an outstanding or paramount title to said lot, or that plaintiff was compelled to, or did, purchase in the same.

Hall v. Bray.

A replication was filed to this answer, by which plaintiff denied that the defendant at the time of the conveyance was in the possession of the lot, or that he then put plaintiff in possession, or that plaintiff sold and conveyed the lot to said Carter, or that the title to the lot had never been questioned.

A trial was had before the court no jury being required by the parties.

It is conceded by the appellant, that the plaintiff on the trial showed title to the lot in one Ethelbert Bright, and a conveyance of the lot from Bright to W. H. Phelps, and from Phelps to one John A. Carter, for the east half of the lot, and from said Carter to Hall, the plaintiff; it is also shown by the evidence that plaintiff paid Carter \$433 29 for the east half of the lot, and that said east half was reasonably worth from six to seven hundred dollars.

On the part of the defendant it was shown on the trial, that plaintiff after his purchase from defendant at once took possession of the lot by virtue of the purchase, and that he and those claiming under him had continued to hold and occupy said lot ever since.

The defendant also read in evidence a deed from plaintiff to John A. Carter, dated October 7th, 1868, by which the plaintiff conveyed to Carter the east half of said lot for two thousand dollars.

This being all of the evidence offered by either party, the Court at the request of the plaintiff, declared the law to be:

"That if the defendant conveyed said lot to plaintiff by deed containing the covenants of an indefeasible estate in fee simple, and at the time of the execution of said deed there was an outstanding title which plaintiff was required to buy in in order to perfect his title, and that plaintiff did so purchase said outstanding title, he is entitled to recover the amount paid for said title, if the amount is not more than the property is reasonably worth, provided it does not exceed the amount paid by plaintiff to defendant for his deed to said lot."

To this declaration of law the defendant excepted.

The defendant then requested the Court to declare the law to be:

"That under the evidence in this case the plaintiff can only recover nominal damages."

The Court refused this declaration of law and the defendant again excepted.

Judgment was then rendered for the plaintiff for the sum of \$447 75. The defendant filed his several motions for a new trial and in arrest of judgment, which being severally overruled, he again excepted and appealed to this Court.

It is contended by the appellant in this Court that to entitle the plaintiff to recover in this case, it was necessary for him to have alleged in his petition and proved on the trial, an eviction, or at least he should have shown facts amounting to a constructive eviction; and it is further insisted that no such evidence was given on the trial of the cause, and that there were no sufficient allegations of eviction in the petition to authorize a recovery; that the Court below therefore erred in giving and refusing the declarations of law given and refused, and in overruling appellant's motion in arrest of the judgment.

We do not agree with the appellant in reference to these objections. The law has been well settled in this State, as well as by other authorities, that where the title conveyed has been defeated and the grantee holds by a title adverse to that acquired from his grantor, it is not necessary to submit to the form of an eviction in order to entitle the party to recover full damages for a breach of the covenant of seizin. The covenant of seizin, if broken, is broken as soon as made, and where the grantee or covenantee purchases in an adverse title, the measure of damages is the amount paid for the outstanding title, if it does not exceed the price originally paid for the land. It of course devolves on a covenantee who purchases in an adverse title without suffering an eviction, to take upon himself the burthen of proving that the title purchased is a good title and that it was purchased for a fair and reasonable price. The law on this subject is ably discussed in the case of *Lawless vs. Collier's Executor*, 19 Mo., 480; also in the case of *Dickson vs. Desire's Administrator*, 23 Mo., 157; 10 Mo., 466. To the same effect is the case of *Abbott vs. Allen*, 14 Johns., 247; *Sedgw. Meas. of Damages* 181.

In the case under consideration the outstanding title had been sold and conveyed several times within the last few months before plaintiff purchased. This was a sufficient assertion of an outstanding and adverse right to authorize the plaintiff to protect himself by a purchase, without waiting for an eviction; but of course in such case, he purchases at his peril, and must be prepared to show that the title purchased is a real one, and superior to the title conveyed by the defendants, and that the purchase was for a reasonable price. (Rawle on Cov., 291-292; Loomis vs. Bedel, 11 N. H., 74.) The petition in this case is fully sufficient and even shows who holds the adverse title, which was not necessary.

The appellant next contends that his motion in arrest of the judgment, should have been sustained, on the ground that the act of the legislature creating the Court of Common Pleas of Jasper County is unconstitutional, being violative of the 27th section of the 4th Article of the Constitution of this State.

This section, after prohibiting the General Assembly from passing special laws for several enumerated purposes, proceeds as follows:

"That the General Assembly shall pass no special law for any case for which provision can be made by a general law; but shall pass general laws providing, so far as it may deem necessary, for the cases enumerated in this section, and for all other cases where a general law can be made applicable."

The law creating the Court of Common Pleas of Jasper County does not fall within any of the enumerated acts prohibited by the Constitution; but if it is prohibited at all, it is by this last general clause, prohibiting special laws where a general law can be made applicable. The question naturally arises who shall decide whether a general law can be made applicable or will answer the purpose intended?

This question has been directly passed on by this court in the case of the "State on the relation of Henderson vs. The County Court of Boone County, (50 Mo., 317) as well as in several other cases.

In the opinion of Judge Adams, in the case referred to, he

uses the following language: "But who is to decide when a general or special law will answer the best purpose? It strikes me that this rule in reference to general or special laws is laid down as a guide for the legislature, and the legislature is to judge of the necessity of the particular case. The legislature is quite as able to do this as the courts. The legislature must in the first instance, exercise their discretion as to the necessity of a special instead of a general act. How can the courts control that discretion? If a discretion be conceded at all, in my judgment the courts have no right to control it.

"It is agreed that there is no discretion in regard to the passage of certain enumerated laws. They are inhibited by the letter of the Constitution. When the legislature undertakes to pass these inhibited laws, it is the plain duty of the courts to declare them unconstitutional. But here we are asked to pronounce upon the necessity of a law, and whether it can be better supplied by a general law than a special act.

"This is the exercise of the discretion of the courts to control the discretion of the legislature."

This Court has since, at the October term, 1872, in the case of the State *ex rel.*, Robbins vs. New Madrid County, *ante*, 82, re-affirmed the doctrine of the Boone County case, and held that it was the province of the legislature and not of the courts, to judge of the necessity of special law, and whether a general law would be applicable.

A different doctrine was held in the case of Thomas vs. The Board of Commissioners of Clay County, (5 Ind., 4) which is so earnestly relied on by the appellants; but in the later case Gentile vs. The State, (29 Ind., 409,) the whole question is reviewed and the case of Thomas vs. The Board of Commissioners, &c., directly overruled and the doctrine is fully sustained that the legislature is the only judge of the necessity for a special act; in a case deemed to be exactly the same in principle with the one under consideration.

The act of the legislature, creating the Court of Common Pleas of Jasper County, being so much the same, at least in principle, as those acts which have been passed on by this court, it would seem that the question has been finally settled in this

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State so as to preclude further controversy on this subject.

The other judges concurring, the judgment of the court below is affirmed.

—o—

RUFUS M. PHILIPS, to use of J. W. TINDALL, Respondent, vs.
EDWARD G. WARD, Adm'r. of estate of Geo. E. Ward, deceased.

1. *Trustee—Suit by—Mention of beneficiary in caption.*—In suit by a trustee, it is not necessary that the name of the beneficiary should appear in the caption even, where the trust is an express one.
2. *Probate Court—Final judgment, appeal etc.*—On appeal from proceedings brought in a Probate Court to establish a demand against the estate of the deceased where the Circuit Court merely renders a finding as to the amount, without entering a final judgment, no appeal will lie.

Appeal from Barton Circuit Court.

Phelps & McAfee, for Appellant.

Sherwood & Young, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was a proceeding commenced in the Probate Court of Barton County, to establish a demand against the estate of George E. Ward, deceased. That court refused to allow the demand, and the plaintiff appealed to the Circuit Court, where the case was tried by the court, by consent of parties, and the court found for the plaintiff the sum of twenty-three hundred and eighty dollars debt, and the further sum of fifteen hundred and twenty-nine dollars and eighty-six cents for damages, and without rendering any final or formal judgment on this finding. The court assuming this finding to be a judgment ordered it to be certified to the Probate Court for classification, and payment out of the assets of said estate.

During the progress of the proceedings, the defendant moved the court to dismiss the proceedings on the alleged ground that there was not a proper party plaintiff, which motion was overruled, and an exception saved, and the defendant also filed a motion in arrest for the same reason and for the reason also,

that the judgment is simply in the name of Philips, and not in his name to use of Tindall, and because the action was not brought in the name of the real party in interest. This motion was also overruled and an exception saved, and the defendant has brought the case here by appeal. It may be that Philips was trustee of an express trust in favor of Tindall, and if so he could prosecute the suit in his name to the use of Tindall. Who was the real party interest, is not disclosed by the record. Nor does it appear for what reason Tindall's name was dropped in heading the proceedings on the final trial. It was not necessary in this case, that it should have appeared at all; even if Philips was the trustee of an express trust in his favor. He might sue on this description in the heading of the proceedings or leave it off without affecting the rights of parties.

I see no error on this point. I have said this much to indicate what my opinion would have been if there had been a final judgment rendered. But there was only a finding of the amount due, and no final judgment rendered. A final judgment may still be entered on the finding of the court, and until that is done no appeal lies to this court and for that reason, the appeal will be dismissed.

Appeal dismissed. Judge Sherwood not sitting. The other Judges concur.

—o—

E. W. HARPER, Respondent, vs. FRANCIS JACOBS and HARRIET JACOBS, Appellant.

1. The act of February, 1870 (Sess. Acts 1870, p. 200, § 15) authorizing the appointment by the Judge of Jasper Common Pleas Court of an attorney at law to act as judge *pro tem* in certain cases, is not unconstitutional as failing to provide an oath of office to be taken by the attorney before trying such cause. (See Const. Art. II, § 13.) Nor is it contrary to that provision of the constitution providing for the establishment of different courts and tribunals, (Const. Art. VI, § 1.) Under that instrument, the legislature would have no power to authorize the substitution of an attorney to sit in a particular case in the Circuit Court but such restriction does not extend to an "inferior tribunal" like the Jasper Court of Common Pleas.

Appeal from Jasper Common Pleas.

L. P. Cunningham, for Appellant.

I. The application for a change of venue, if considered at all, must be either sustained or overruled, and if sustained, a change of venue should have been awarded to another court. (W. S., 1356, § 4.) It was not transferring the cause to another court or awarding a change of venue in any sense, to simply substitute another person for the Judge as was done.

II. The court had no authority to appoint any person to act as Judge, and sit as a court for the trial of the cause. A ministerial office may be deputed, but a judicial office cannot be. (Lewis vs. Lewis, 9 Mo., 187; 3 Kent Com., 615; Winchester vs. Ayers, 4 Greene, (Iowa) 104.) A Judge is to be elected by the people or appointed by the governor. (Const. of Mo., Art. V, § 25; Sess. Acts of 1870, p. 201, §§ 19, 21 and 27.)

III. It is urged that section 15 of the act establishing the court of Common Pleas—Laws of 1870, page 201 confers power to appoint a Judge *pro tem* who shall be authorized to hear and determine a cause. The appellants insist that this section is controlled by other sections of the same act, sections 5, 6, which made it imperative to award a change of venue to another court, and that section 15 taken by itself, is wholly unconstitutional and inoperative. (Const. of Mo., Art. V, §§ 8, 25; Winchester vs. Ayers, 4 Greene, (Iowa) 104.)

IV. The points made by the respondent are not sustained by the authorities which he relies upon. The decisions in Indiana cited, were made upon a different state of facts, and under a constitution entirely different from that of Missouri. (Const. of Ind., Art. VII, § 10.)

N. Bray, for Respondent, cited Winchester vs. Ayres, 4 Greene, (Iowa,) 104.

EWING, Judge, delivered the opinion of the court.

This was an action instituted in the court of Common Pleas of Jasper County to foreclose a mortgage. Before answering the petition defendants made an application in the usual form

for a change of venue, on the ground that plaintiff had an undue influence over the mind of the Judge of said court, and that said Judge was prejudiced against the defendants.

Pending this application, the Judge, by an order duly entered of record, appointed William H. Phelps, a duly licensed Attorney at Law, Judge *pro tem*, to sit on the trial of said cause. To this action of the court defendants excepted. The cause was heard by said Phelps, defendants not appearing at the trial and judgment rendered for plaintiffs.

Motions for a new trial, and in arrest of the judgment were filed, alleging as error the action of the court above stated; which being overruled defendants excepted, and bring the cause to this court by appeal.

It is maintained, that the action of the legislature authorizing the appointment of a Judge, *pro tem*, is unconstitutional.

The act in question provides, that whenever in any cause an application shall be made for a change of venue, for the reason that the Judge is interested or prejudiced, or is related to, or has been of counsel in the cause for either party, or that either party has an undue influence over the mind of the Judge; it shall be lawful for the Judge to appoint by an order of record, any duly licensed Attorney at Law of this State, Judge *pro tem* for the trial of the particular case specified in said order. Said Judge so appointed, shall possess during such trial and in relation thereto only, all the powers, perform the duties, and be subject to the same restrictions as the Judge of said court. (Sess. Acts of 1870, p. 200, § 15.)

This provision occurs in an act approved February, 1870, which is amendatory of an act to establish a court of Common Pleas in Jasper County.

The provision of the constitution with which this act is supposed to be in conflict, is that requiring every person elected or appointed to any office before entering on its duties, to take and subscribe the oath therein specified. (Const. of Mo., Art. II, § 13.)

The argument of counsel assumes that the omission to provide for such an oath in the act, invalidates it; that the Attorney who is appointed under it to sit in a particular case, is an

officer in the sense of the clause in the constitution referred to, and that as the record is silent in regard to an oath, being taken or not, it is to be presumed that no such oath was in fact taken by the Attorney who tried the case. If the theory that the Attorney who tried the case, was a judicial officer, and as such, under like obligations with other judicial officers to take an oath, be correct, the absence of any provision in the act on the subject is wholly immaterial, and it would, have been superfluous if there had been any such requirement. For the constitutional requirement on the subject would, on that theory, apply to a temporary Judge, as well as to judicial officers regularly chosen. It is true, there is no express provision in the act requiring an oath in such cases, and whether an obligation to take it is implied by anything in the section above quoted, it is unnecessary for the reasons already stated to consider.

If an oath was a pre-requisite by reason of the judicial functions with which the Attorney for the time being, was invested, it was made such by the constitution and a general law requiring it of all officers. And we are not to *presume* that he failed to perform any duty while acting in that capacity, or which was pre-requisite to his assumption of it.

It he failed to take an oath before acting as Judge, the fact does not appear in the record, and no such point was made in the court below.

Whether such legislation is wise or unwise, or whether possible abuses might not *result* from it, are questions that address themselves to the law-makers not to the courts.

The only question is one of constitutional power to enact the law now considered. Under the constitution, all judicial power as to matters of law and equity is vested in a Supreme Court, in Circuit Courts, and in such inferior tribunals as the General Assembly may from time to time establish.

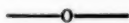
The limit to the exercise of the power here conferred is the discretion of the Legislature, and a necessary incident of the power to establish such inferior tribunals is the right to define their jurisdiction and powers, to prescribe the manner of choosing the Judges thereof, the tenure of the office and

qualifications. There is no restriction upon the power of the legislature in these respects. The constitution has made provisions in respect to the mode of choosing the Judges of the Supreme and Circuit Courts, namely, by election by the people, and in certain cases of vacancy, by appointment by the Governor. And it has also provided that in certain cases, the Judge of one circuit may hold the terms of court in another circuit. Under this provision, it may be conceded that the Legislature would have no power to authorize by law the substitution of an attorney to sit in a particular case in the Circuit Court, or perhaps even the Judge of one circuit to sit in a particular case in another circuit. (Gale, Admr. of Maupin vs. Michie, 47 Mo., 326.) But this provision applies exclusively to Circuit Courts, and has no application to such inferior courts as may be created by law. As to these the constitution is silent, except as to the power to establish them from time to time, leaving all else to be regulated by law.

A similiar question arose in the case of Brown vs. Buzan, (24 Ind., 194.) A law of that State (Indiana) authorized the Judge of the court of Common Pleas to appoint, in certain cases, a member of the bar as Judge, *pro tempore*. Under this act, the Judge being unable to attend at the term of the court in which the judgment was rendered, appointed an attorney to hold the court. The constitution of that State like that of Missouri, gave the Legislature power to establish inferior courts, and provided that Judges of the Supreme and Circuit Courts should be elected by the people for six years; but that provision might be made by law for holding the Circuit Court, when the Judge thereof should be temporarily unable to attend. It was maintained that the act in question, was in conflict with the clause of the constitution; but it was held otherwise, the Judge delivering the opinion, saying that the act was undoubtedly within the purview of Legislative authority. In the case of Winchester vs. Ayres, (4 Greene, (Iowa) 104) cited by appellant's counsel, an act which authorized the parties, by consent of court, to select any person to act as Judge for the trial of a particular case, was

held unconstitutional. This was a case in the District Court, however, and the decision was based evidently upon the ground, that the constitution prescribed the manner in which District Judges should be elected, and the absence of and power in the Legislature to make any provisions of the kind attempted in the act under consideration.

The Judgment of the Common Pleas Court is affirmed. The other Judges concur.



ELISHA HEADLEE, PUBLIC ADMR., Appellants, vs. SAMUEL P.

CLOUD AND M. H. RITCHY, Respondent.

1. *Administrator, suit by—Petition, caption, etc.*—In suit brought by a public administrator, the body of the petition should show his authority to bring the action. Matters set forth in the caption, will not obviate defects in that regard. The caption is simply a *descriptio personæ*, and forms no part of the statement required in the petition.
2. *Administrator, public—May take charge of partnership assets, when—May be removed, how.*—A public administrator may be ordered to take charge of the assets of a partnership, where one member is deceased, in order to prevent their being injured, wasted, purloined or lost, (W. S., 122, § 8,) provided that there is no existing administrator having charge of the partnership effects. And he cannot be divested of the estate in a collateral proceeding, but only on application to the Probate Court.

Appeal from Newton Circuit Court.

James F. Hardin, for Appellant.

McAfee & Phelps, for Respondent.

Plaintiff as administrator, sued Cloud & Ritchy on a note and certain account, due to the firm of Caynor & Co. Other facts appear in the opinion of the court.

ADAMS, Judge, delivered the opinion of the court.

This case comes up on a demurrer to the petition. In the caption of the petition, the plaintiff describes himself "as public administrator," having charge of the partnership estate of John H. Caynor & Co., but it nowhere appears in the petition, by any allegation, that he was public administrator of

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Greene County. The caption is simply a *descriptio personæ* and not a substantive allegation. The petition by proper averments ought to show the authority of the plaintiff, to bring such a suit. (State. to use of Tapley's Admr. vs. Matson, 38 Mo., 489.)

The demurrer also raises the objection that a public administrator, cannot be ordered to take charge of partnership assets of a deceased partner.

It is urged that only the surviving partners or the administrator on the individual estate of his deceased partner, can be, allowed to administer on the partnership effects.

Our statute concerning public administrators, (see 1 W. S., 122, § 8,) provides that it shall be the duty of the public administrator to take into his charge, etc., estates of deceased persons in his county, when from any good cause, the Probate Court shall so order, to prevent their being injured, wasted, parloined or lost.

The estate of deceased partners or their interest in partnership effects, form no exception to this rule.

If the contingency referred to exists, the Probate Court may make the order; but the court could make no such order if there was an existing administrator, having charge of the partnership effects.

It does not appear on the face of this petition, that there was any such existing administration on the partnership, and therefore this ground of demurrer was not properly taken.

A public administrator after letters testamentary or of administration are granted, must, under the orders of the court, account for, pay and deliver to such rightful executor or administrator, all money property, &c., of every kind, in his possession. (1 W. S., 122, § 11.) When a public administrator takes possession under the order of the court of an estate, he cannot be divested of it in a collateral proceeding, but only on application to the Probate Court, under the section above referred to.

As the demurrer was properly sustained on the first point the Judgment is affirmed. The other Judges concur.

 McKinzie, Admx. v. Hill, Admr.

MARTHA MCKINZIE, Admx. of ALEX. MCKINZIE, deceased,
Appellant, vs. H. L. W. HILL, Admr. of WM. W. GAY,
deceased, Respondent.

1. *Administration—Letters of—Statute of limitations—Note—General limitation Law.*—The statute of limitations commences running in favor of the estate of a deceased person only from the grant of letters. And a claim against the estate may, under the administration law be proved up within two years thereafter. But where the claim would otherwise be barred by the general limitation law, this period of two years cannot be grafted upon the statute as an extension of time. Thus, where in case of a promissory note, the grant of letters was less than ten years from its date, and the demand was exhibited, less than two years afterward, but more than ten years from the date of the paper, the demand will be barred.
2. *Limitations, statute of—Promissory notes—Rebellion, etc.*—In case of a promissory note made in Lawrence County, Missouri, in 1858, the running of the statute will not be stopped during the time in which the courts of the county were closed in consequence of the rebellion.

Appeal from Lawrence Probate Court.

Nathan Bray, for Appellant.

I. If ten years had not elapsed between the maturity of the note and the death of the maker, or grant of the letters of administration, then it was not barred by the ten years statute, for as soon as Gay died, the statute ceased to run until an administration was had on his estate. The plaintiff certainly had the right to prove facts which would take the case out of the statute. (Polk, Admr., vs Allen, 19 Mo., 467; 18 Mo., 220; 29 Mo., 292; Hanger vs. Abbott, 6 Wall., U. S., 532; also Protector, 9 Wall., 687; Levi vs. Stewart, 11 Wall., 244; Stewart vs. Kahn, *Id.*, 493, 3; United States vs. Wiley, *Id.*, 508; Braun vs. Sauerwein, 10, Wall, 218; 3 Cranch 454; Ang. on Lim., ch. 8, p. 45; Richards vs. Maryland Ins. Co., 8 Cr., 84; 12 Wheat., 129; Ang. Lim., p. 49, §§ 62, 63; 11 Wall., 513.)

II. The appellant claims that she had the right to prove that the courts of the country were closed by the civil war, by showing a state of facts, which would prevent the statute of limitations from running. (See cases already cited in Wallace Reports.)

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But appellant also claims under the testimony in this case; the judgment should have been for the plaintiff.

The record shows that the note was due Jan. 1st, 1859, and that notice of the presentation of the demand was served on the Administrator on the 14th day of July, 1868, less than ten years from the maturity of the note.

H. Brumback, for Respondent.

I. The two years statute does not have the effect of superseding or extending the ten years statute.

II. The court properly excluded testimony to show that Lawrence County was within the rebel lines for six months in 1861 and 1862, and also that no Circuit Court was held in said county from Feb. 1861 to May 1862. (*Bank of State of Alabama vs. Dalton*, 9 How., 522 ; *Ang. on Lim.*, 488 ; *Richardson, Admr., vs. Harrison, Admx.*, 36 Mo., 96.)

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding originally instituted in the Probate Court of Lawrence County, to obtain the allowance of a demand against the estate of the defendant's intestate. The defense was the statute of limitations. The demand consisted of a promissory note for two hundred dollars, dated December 31, 1858, and due one day after the date thereof. The record shows that notice was given to the administrator on the 14th day of July, 1868, that the note would be presented for allowance at the next October term of the Probate Court. But at that term the plaintiff did not appear, no presentation was made, and no steps were taken in the matter. A new notice was then given, that the demand would be presented for allowance at the April term, 1869, which was served on the 2d day of April in the same year, at which term the cause was submitted to the court and judgment was rendered for the defendant. On appeal to the Circuit Court, the plaintiff offered to introduce evidence to prove that the notices were served, and that the action was commenced within two years after the granting of letters of administration on the estate of the defendant's intestate, and then offered evidence to show that Law-

rence County was in the rebel lines for six months in 1861,-62, and that on account of the rebellion, no Circuit Court was held in that county from February 1861, till May 1862, which evidence the court excluded and the plaintiff excepted.

Plaintiff then asked for declarations of law founded on the excluded testimony which the court refused to give, and then found for the defendant—thus affirming the judgment of the Probate Court.

A motion for a new trial was duly filed, the reasons assigned being that the court erred in refusing the declarations of law, and that it also committed error in excluding competent testimony.

There was no error in refusing to give the instructions, for after the evidence was ruled out, there was nothing on which to base them.

The only question then before us is, whether the evidence which the court rejected was proper to be admitted in the cause.

At what time the letters of administration were granted to the defendant on the estate of the maker of the note is not shown. The doctrine established by this court is, that the statute of limitations does not run in favor of an estate during the time there is no administration; that it only commences running from the grant of letters. (*Polk vs. Allen*, 19 Mo., 467; *McDonald vs. Walton*, 2 Mo., 43.)

But, here the offer was to prove that the claim was exhibited within two years after the granting of letters. That is the time allowed by the statute for proving up claims against an estate, but if the demand is barred by the general provisions of the statute before it is presented, it was never intended to graft this on the statute as an extension of time.

The first notice must be wholly disregarded, as no attempt was made to proceed under it, and the second notice was not given till after ten years had gone by, and the statute therefore is a complete protection, unless we exclude the time in which it is alleged the Circuit Court was suspended in consequence of the rebellion.

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Richardson, administrator, vs. Harrison, administratrix (36 Mo., 96), was a case similar to this, and we there held, that proof that the civil law was suspended on account of the war, during a portion of the period, would not extend the time for presenting the claim. The court there remarked that it did not appear that the civil law was suspended for nearly a year after the statute had commenced running; nor did it appear that the plaintiff's remedy was ever suspended, for he might still have served a notice on the executrix, and that would have had the effect of saving the bar.

But it is contended that the Supreme Court, of the United States, has laid down a different doctrine. The case in which the question first arises is *Hanger vs. Abbott* (6 Wall., 532.)

In that case Abbott, a citizen of New Hampshire, sued Hanger, of Arkansas, in *assumpsit*. The latter pleaded the statute of limitations of Arkansas, which limits such actions to three years. The former replied, setting up the fact of the rebellion, which broke out after the cause of action accrued and closed for more than three years all lawful courts. On these facts the court decided that the time during which the courts in the lately rebellious States, were closed to citizens of the loyal States, is, in suits brought by them since, to be excluded from the computation of the time fixed by statutes of limitation within which suits may be brought.

Mr. Justice Clifford, as the organ of the court, delivered an elaborate opinion and placed the judgment entirely on the ground that, during the pendency of war, there is a total non-intercourse between the belligerents. That, when hostilities are commenced, all trading, negotiation and communication, between the citizens of one of the countries with those of the other, without permission of the governments, is unlawful.

That a citizen of one of the hostile nations would not be allowed to enforce his contracts in the courts within the territorial limits of the other.

Proclamation of blockade was made by the President on the nineteenth day of April, 1861, and on the thirteenth day of July, in the same year, Congress passed a law authorizing the

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President to interdict all trade and intercourse between the inhabitants of the States in insurrection, and the rest of the United States. Under these circumstances the plaintiff was effectually precluded from bringing suit to assert his rights in the forum where the defendant resided. After the termination of the war, and the restoration of peace, the plaintiff had a tribunal in which to commence his action, but if the statute was to run during the time in which he was disabled, it would be a barren right. The court on this point says:

"But the exception set up in this case stands upon much more solid reasons, as the right to sue was suspended by the acts of the government, for which all the citizens are responsible. Unless the rule be so, then the citizens of a State may pay their debts by entering into an insurrection or rebellion against the government of the Union, if they are able to close their courts, and to successfully resist the laws until the bar of the statute is complete, which cannot for a moment be admitted. Peace restores the right and the remedy, and as that cannot be if the limitation continues to run during the period the creditor is rendered incapable to sue, it necessarily follows that the operation of the statute is also suspended during the same period."

This doctrine is approved and followed in subsequent cases. (*The Protector*, 9 Wall., 687; *Levi vs. Steward*, 11 Wall., 240; *Stewart vs. Kahn*, *Id.*, 493; *U. S. vs. Wiley*, *Id.*, 508.)

But the principles above announced have no application to the present case. Missouri was not one of the States that joined in the rebellion, and her courts were open. The plaintiff labored under no disability, and his demand accrued and the statute had commenced running before the alleged temporary suspension of the holding of the Circuit Court. Both parties were residents of the same county and within the same jurisdiction.

It was not necessary that the court should be held to enable him to pursue his remedy and avoid the bar of the statute. He might have filed his suit with the clerk of the court, and had summons issued and served, and that would have

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been sufficient. There is no pretense that this course was not open to him.

In my opinion, the evidence was properly excluded, and the judgment should be affirmed.

All the Judges concurring.

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Z. L. SLAVENS, Respondent, vs. SOUTH PACIFIC RAILROAD COMPANY, Appellant.

1.—*Railroad, Suit against—Residence of—Construction of statute.*—Under a proper construction of the statute (W. S., 847, § 3) for the purpose of bringing action, the residence of a railroad corporation is in any county through which its line of road passes, and in which it has an agent upon whom process can be served.

Appeal from Laclede Circuit Court.

James Baker and J. N. Litton, for Appellant.

I. Appellant was within the meaning of the statute, a non-resident of Laclede county, but was a resident of St. Louis county. (Conn. R. R. vs. Cooper, 30 Vermont, 476; 2 Redf., on R. R., 384; Thorn vs. Central R. R., 2 Dutch N. J., 121; R. R. Co. vs. Alexandria, 17 Gratt., 76; Jenkins vs. California Stage Co., 22 Cal. 537; How., Pr., 149; Sangamon county R. R. vs. Morgan county 14 Ills., 166.)

J. D. Mathews, for Respondent.

I. Appellant was a resident of Laclede county within the meaning of Sec. 3, p 847, Wag. Stat. In legal contemplation a railroad resides in any county through which its road passes. (Bristol vs. The Chicago and Aurora R. R. Co. 15 Ill., 436 Baldwin vs. Miss. & C. R. R., 5 Clark (Iowa) 518; Richardson vs. Burlington R. R. Co., 8 Clark (Iowa) 260; Crofut vs. Brooklyn Ferry Co. 36 Barb. 201; See also Farnsworth vs. Terre Haute and Alton R. R. Co., 29 Mo., 75; Androscoggin and Kenebec R. R. Co., vs. Stephens, 28 Maine, 434; Belden vs. New York and Harlem R. R. Co., 15 How., Pr., 17.)

WAGNER, Judge, delivered the opinion of the court.

Plaintiff commenced his suit against the defendant before a justice of the peace in Laclede county, and summons was served upon defendant's station agent in that county.

At the trial, judgment was given for the plaintiff, and defendant at the time gave notice of its intention to take an appeal to the Circuit Court, but failed to file a bond or affidavit within ten days.

Thirteen days after the trial, affidavit and bond were filed, and the case was taken to the Circuit Court. In that court the plaintiff filed his motion to dismiss the appeal because the same was not taken and perfected within ten days. His motion was sustained, and defendant appealed to this court.

The only question is whether the defendant, whose track runs through Laclede county, is a resident or non-resident within the meaning of the act in reference to granting appeals.

The Statute provides that no appeal shall be allowed, unless it be made within ten days after the judgment rendered, or where judgment is by default or non-suit, within ten days after the refusal of the justice to set aside the default or non-suit and grant a new trial; but if the party is a non-resident of the county where the suit is instituted, then he is allowed twenty days within which to make his appeal. (2 W. S., 847, § 3.)

Suits against corporations may be commenced in any county where such corporations have or usually keep an office or agent for the transaction of their usual and customary business. (1 W. S., 394, § 26, 28; Dixon vs. H. & St. Jo. R. R. Company, 31 Mo., 409.)

It seems to me upon a fair construction of the Statute that a corporation is a resident of the county through which its line of road passes, and in which it has an agent upon whom process can be served, and where suits are authorized to be commenced. It is true, upon this question there have been contradictory decisions.

In Vermont the court holds, that the residence of a railway company for the purpose of bringing actions, is the county or

town upon the line of their road, where their principal office and the center of their business operations is situated. (Railroad Company vs. Cooper, 30 Vt., 476.) So in New Jersey it is held that in a suit brought against a corporation, the venue should be laid in the county where their principal office is located, that being considered their place of residence, and that the rule applies to railroad companies, where their road runs through, and their franchises are exercised in different counties. (Thorn vs. Central Railroad Company, 2 Dutch, 121.)

But in the case of the City of St. Louis vs. Wiggins Ferry Company, (40 Mo., 586) this court declared that there can be no doubt that, within the limits of the State which grants the charter, a corporation may have a special constructive residence, in more places than one, so as to be subjected to the local jurisdiction where its officers and agencies are actually present in the exercises of its franchises and in carrying on its business; and that the legal residence of a corporation is not necessarily confined to the locality of its principal office or place of business. It depends on the official exhibition of legal and local existence, and its place of residence may be wherever its corporate business is done, (Glaize vs. South Carolina Railroad Company 1 Strob., 70; Cromwell vs. Insurance Company, 2 Rich., 512.)

In Bristol vs. The Chicago and Aurora Railway Company, (15 Ills., 436,) it was decided that a corporation has its residence where it exercises corporate functions; where its business is done; where its franchises are exercised; where it is engaged in the prosecution of the corporate enterprise, or in any county in which it operates the road.

This doctrine was quoted with approval, followed and affirmed in Baldwin vs. Mississippi Railroad Company, (5 Iowa, 518), and in Richardson vs. Burlington, etc., (8 Iowa, 260.)

In U. S. Bank vs. Devaux, (5 Cranch, 84), it is said of a corporation, "this ideal existence is considered as an inhabitant, when the general spirit and purpose of the law requires it.

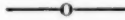
Although in the present case the principal office of the defendant was situated in St Louis county, still it was as much

Faulkner, et al., v. South Pacific R. R.

engaged in prosecuting the enterprise for which it was brought into being, and in transacting its general business in the county of Laclede as it was in the county of St Louis.

The road was operated and the corporate franchises exercised in every county through which it ran. Under the provisions of the Statute then, for the purpose of being sued, I think it had a local *situs* and residence, and that it was entitled to no greater privileges than an actual resident of the county. Wherefore the judgment will be affirmed.

The other judges concur.



ROBERT P. FAULKNER, *et al.*, Respondent, *vs.* SOUTH PACIFIC
RAILROAD, Appellant.

1.—*Railroads — Freights — Transportation — Pressure of business — Inadequacy of rolling stock.*—Where, by reason of unusual pressure of business, the rolling stock of a railroad is inadequate for the transportation of freight, the company may decline to receive it, without incurring any liability; but where the freight is received and shipped, the railroad must forward it without delay, or answer for damages caused thereby. And in such case the measure of damages will be the difference in the price of the goods when they ought to have been delivered, and when they were actually received at their place of destination.

Appeal from Laclede Circuit Court.

James Baker and J. N. Litton, for Appellant.

R. P. Bland for Respondent.

ADAMS, Judge, delivered the opinion of the court.

The plaintiff sued the defendants for damages growing out of the alleged breach of contract of affreightment from St. Louis to Lebanon, and from Arlington to Lebanon also, for goods sold and delivered, and upon an account for lost goods assigned to plaintiffs.

The petition alleges that defendant is a corporation, and that it is a common carrier of goods and passengers from St. Louis to Lebanon. This allegation is not noticed by the answer, and it therefore, for the purpose of this case, must be

taken as true, and this will dispose of the question of alleged partnership between the two railroads, as it makes no kind of difference whether the two railroads were partners or not. They nevertheless could make an arrangement whereby the South Pacific might become liable as a common carrier for shipments, etc., in connection with the Pacific Railroad Company from St. Louis to Lebanon, and as this allegation is not denied, the presumption is that this arrangement did exist.

The answer after thus impliedly admitting the above allegation, denies all the other material allegations of plaintiff's petition, and sets up as a counter-claim the sum of two hundred dollars which had been paid by mistake to the plaintiff. This two hundred dollars is also referred to in the petition, and deducted from the amount of damages claimed by the plaintiffs. The plaintiffs based their right to damages on the ground of delay in forwarding their goods to their places of destination, after they had been shipped or received by the defendants on board of their cars, and charged that the goods during this time declined in value, and the difference in value between when they ought to have been delivered, and when actually delivered is the gravamen of their complaint as to these shipments. They also claim that some lumber shipped was never delivered, and claim that it was converted by the defendants.

The plaintiff introduced evidence tending to prove their case as laid in the petition, and conducing to show that there was a delay of several days in delivering the goods beyond a reasonable time for that purpose.

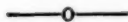
The defendants introduced evidence tending to show that at the time these goods were shipped, there was a large accumulation or rush of business of this character, which amounted to more than the rolling stock could carry, and that the delay grew out of this extraordinary rush of business; that they had sufficient rolling stock for the usual or ordinary transaction of the business of the road. The first point relied on by the appellants is, that the company was released from liability for the delay in the delivery of the goods by the extraordinary rush of business, which required more than the

Wickersham, v. Johnson, et al.,

usual amount of rolling stock, &c. If this had been a mere offer to deliver goods for transportation, the company would have been justified in refusing to receive them, on the ground referred to. But the petition alleges an actual shipment, and this allegation is supported by the proof. Where goods are actually shipped, it is the duty of common carriers to send them forward without delay. After the reception of the goods it is too late to look to the rolling stock, &c. They must do this before the reception of the goods; and if there be an unusual influx of business beyond their capacity, they may decline an offer for shipment of goods without incurring any liability. This doctrine was maintained by this court in *Tucker vs. The Pacific Railroad Company*, 50 Mo., 385; and we see no reason now to disturb this ruling.

The next point is in regard to the measure of damages. This question was also presented in *Tucker vs. The Pacific Railroad Company*, by an instruction to the effect that the measure of damages was the difference in the price of the goods between when they ought to have been delivered, and when they were actually received at the place of destination. This instruction was held to be correct, and it is substantially the same as those objected to on that subject in this case.

On the whole record, I think that the verdict and judgment were for the right party. Judgment affirmed. Judge Sherwood not sitting. The other Judges concur.



ISAAC WICKERSHAM, Plaintiff in Error, vs. M. W. JOHNSON,
et al., Defendant in Error.

1. *Judgment of Circuit Court—Pleading as to allegations concerning.*—In pleading the judgment of a Circuit Court, it is not necessary to aver that it gave a valid judgment. The mere allegation that it gave judgment is sufficient.
2. *Damages—Land—Sale of—False Representations* Semble that persons conspiring together by their false and fraudulent representations, causing land to be sold at a sacrifice, will be liable in damages for the injuries done.

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*Error to Laclede Circuit Court.**R. P. Bland*, for Plaintiff in Error.*Phelps and Young*, for Defendants in Error.

WAGNER, Judge, delivered the opinion of the court.

The petition alleged that the defendant, Johnson, with others, obtained a judgment against the plaintiff in the Circuit Court of Laclede county, and that execution was issued thereon, and the same was levied upon lands of the plaintiff therein specified; that the defendants caused the sheriff to sell the lands in gross, and not according to the lowest legal subdivisions, and that Young, acting as attorney for Johnson, and conspiring with him for the purpose of defrauding plaintiffs, represented to the sheriff and to bidders at the sale, that he held liens on the property to the amount of about eight hundred dollars that would have to be discharged and satisfied before a title would be acquired, and before any valid sale could be made, and that these representations were particularly made to one James Mahan, who intended to bid at the sale. It is further alleged that in order to prevent Mahan and others from bidding for the property at the sale, defendants agreed to and with Mahan that if he would not bid, defendants would bid it in for him and let him have it upon the payment of the execution, and the further sum of eight hundred dollars, to defendants. That on account of said conspiracy, Mahan and others were prevented from bidding at the sale, and that the property was sold to the defendants for a nominal sum, and that they caused the deed to be made to Mahan, he paying off the execution and the additional sum of eight hundred dollars. The petition then avers that Young had no claim or lien of any character whatever upon the property, and that the representations were made for the purpose of defrauding plaintiff and depriving him of his property; that the property was worth fifteen thousand dollars, and that by virtue of his deed, Mahan went into possession of the property, and the same became and was a total loss to plaintiff; in consideration of which he asks judgment for damages.

To this petition defendants demurred and assigned as causes of demurrer, that the petition did not show that the judgment mentioned, under which the alleged sale took place was a valid judgment, or that the defendant in the judgment was ever served with process; that if the facts stated in the petition were true, the sale was voidable.

The court sustained this demurrer and gave judgment thereon and the plaintiff sued out his writ of error.

The first point assigned in the demurrer is unavailing. The Circuit Court is a court of general jurisdiction, and in pleading it is only necessary to allege that it gave judgment, and that it had jurisdiction in the case will be presumed. Our statute has even gone so far as to declare that in pleading a judgment or determination of a court of special jurisdiction, it shall not be necessary to state the facts conferring the jurisdiction, but such judgment or determination may be stated to have been duly given or made. (2 W. S., p. 1020, § 42.)

Although the sale might have been set aside on motion, it does not thence follow that the plaintiff has no other remedy.

The gist of the allegation is, that he suffered great loss by reason of the defendants conspiring together, and that through their false and fraudulent representations, his property was sacrificed; that they deterred bidders and falsely represented that there was a prior lien of eight hundred dollars on the property, and that they obtained an unconscionable advantage in consequence thereof. If these allegations are sustained, I am inclined to the opinion that he might maintain his action. (See *Matlock vs. Bigbee*, 34 Mo., 354.)

I think that the judgment should be reversed, and the cause remanded.

The other Judges concur except Sherwood, J., who did not sit.

Engle, v. Jones.

JOSEPH ENGLE, Respondent, vs. GARSHAM B. JONES, Appellant.

1. *Damages—Trespass—Damages when compensatory only.*—In an action of trespass, unless the offense be committed in a wanton, rude or aggravated manner, indicating oppression, malice or a desire to injure, the damages should be compensatory only, and where the evidence wholly fails to show any of these elements, a judgment including vindictive damages will be set aside on appeal. (Franz vs. Hilterbrand, 45 Mo., 121.)

Appeal from Polk Circuit Court.

McAffee and Phelps, for Appellants, cited: Logan vs. Small, 43 Mo., 254; Franz vs. Hilterbrand, 45 Mo., 121; McKeon vs. Citizens Railway, 42 Mo., 80; (latter clause on page 88.)

J. P. Ellis, for Respondent, cited: Allred vs. Bray, 41 Mo., 485; Franz vs. Hilterbrand, 45 Mo., 122; Walker vs. Borland, 21 Mo., 289; Goetz vs. Ambs, 27 Mo., 31; Friedenheit vs. Edmonson, 36 Mo., 230.

WAGNER, Judge, delivered the opinion of the court.

We have seen nothing objectionable in the record, except in the ruling of the court, in reference to the question of damages. The other points were all fairly submitted, and the jury were the proper judges to pass upon them.

The action was in trespass for taking and converting two horses belonging to the plaintiff, and the court instructed the jury that if they found for the plaintiff, they should assess his damages at the actual value of the property when taken, unless the same was taken maliciously or wantonly, and in that case they might assess damages by way of smart money. No witness placed the value of the horses higher than one hundred and eighty dollars, and the jury returned a verdict for three hundred dollars.

As an abstract proposition of law the instruction was correct, but the objection to it is, there was no evidence in the case justifying it. No aggravating circumstances were disclosed calling forth the rule applicable to vindictive damages. Unless the trespass is committed in a wanton, rude or aggravated manner, indicating oppression, malice or a desire to

Moore, et al., v. Stanley.

injure, the damages should be compensatory only. (Franz vs. Hilterbrand, *et. al.*, 45 Mo., 121.)

As the evidence wholly failed to show any of these elements, the judgment should be reversed, and the cause remanded.

The other Judges concurring.

—o—

HANNAH MOORE, *et al.*, Appellant, *vs.* THOMAS STANLEY,
Respondent.

- 1.—*Order of publication—Notification of attachment—What sufficient.*—Notice to defendant under an order of publication that an action commenced against him "by petition and attachment," is a sufficient notification of the attachment.

Appeal from Polk Circuit Court.

Phelps & McAffee, for Appellants.

The order of publication made, and notice of suit published, do not state the property of defendant, *has been* or *is about to be attached*.

F. P. Wright, for Respondent.

The publication is within the spirit and intent of the statute of 1855, and literally embraces the law in the statute of 1865, which only requires an order "notifying them of the commencement of the suit and stating briefly the object and general nature of his petition." (W. S., 1008, § 13.) The statute does not make it essential that the clerk making the order, should insert the words, "*That his property has been attached.*"—(Sec. 23 p. 246.)

SHERWOOD, Judge, delivered the opinion of the court.

This is an action of ejectment, brought in the Polk Circuit Court. Joseph M. Griffith is claimed as the common source of title. Defendant admitted he was in possession of the lands sued for, and was in possession thereof at the commencement of this suit. The plaintiff read in evidence, a deed from

Joseph M. Griffith, dated February 10, 1868, for the land in question. The defendant read in evidence, a deed from the sheriff of Polk county to him for said lands, reciting the attachment of said lands October 17, 1865; judgment rendered March 13, 1866; a sale on execution to defendant September 4, 1866, and a deed by sheriff to defendant, of same date.

The plaintiff, to show that the judgment referred to in the sheriff's deed to defendant was void, read in evidence the order of publication, which it was admitted was the only notice given to the defendant, Griffith, in that suit.

The plaintiff asked a declaration of law, in these words:

The order of publication read in evidence, is not a sufficient compliance with the law in attachment cases under the statute of 1855, and did not authorize a judgment of default against said Griffith.

The court refused to thus declare the law, and plaintiffs excepted.

The court then, at the defendant's request, gave a declaration of law, to the effect, that the judgment under which defendant bought the land, was valid. To this, plaintiff excepted, and judgment being rendered for defendant, after moving unsuccessfully for a new trial, plaintiffs bring the cause here by appeal.

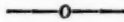
The only question for examination here is, the sufficiency of said order of publication. That order is made by the clerk in vacation—states the nature and amount of plaintiff's demand, notifies defendant that an action has been commenced against him "by petition and attachment," and unless he be and appear, &c., and plead, answer, or demur to plaintiff's petition, the same will be taken as confessed, and judgment rendered against him, and his property sold to satisfy the same.

In *Harris vs. Grodner*, 42 Mo., 159, the order of publication was also made by the clerk in vacation, was similar to the one under consideration, except that it notified the defendant that his property "was about to be attached."

The Circuit Court refused upon this publication, to render a

judgment, by default, and on the case coming here, this court held the publication sufficient, remarking that, "The simple order of publication does not of itself operate as an attachment—the law having pointed out the manner in which attachments shall be made—but it is intended to notify the defendant of the pending attachment, in order that he may appear in court and make his defense." And the court further held in that case that, "when publication issues in vacation, at the very commencement of the proceedings, the clerk cannot actually know and certify that the property has been attached, but he can only say it is about to be attached; and this furnishes sufficient notice to the defendant within the meaning of the statute."

Applying the rule as laid down in the above case to the present one, I am satisfied of the correctness of the rulings of the court below, and its judgment, with the concurrence of the other Judges, is therefore affirmed.



STATE to use of JUNIUS McCracken, Appellant, vs. A. G. BLACKMAN, Respondent.

1. *Attachment bond—Suit on traveling expenses—Attorney's fees, etc.*—In suit on an attachment bond, where the petition contains only a general allegation that plaintiff has been injured and has sustained damages in a specified amount, plaintiff cannot recover for expenses incurred in traveling to the place of trial or for Attorney's fees.

Appeal from Stone Circuit Court.

E. G. Mitchell, for Appellant.

If the bond sued on is not a good statutory one, yet it is a good voluntary and common law bond, and the respondent will not be permitted to complain. (State to the use, etc., vs. Berry, 12 Mo., 376; 7 Mo., 458; Barnes vs. Webster 16 Mo., 258.)

The breach is well assigned, (12 Mo., 376; Barnes vs. Webster, 16 Mo., 258.)

The evidence excluded was competent under the pleadings.

State, etc. v. Blackman.

(Hayden & Smith vs. Sample, 10 Mo., 215; State to the use of Poe vs. Thomas, 19 Mo., 613.)

The court will grant any relief consistent with the facts stated (Northcraft vs. Martin, 28 Mo., 469.)

But appellant insists that a proper judgment is prayed for. (1 W. S., 22, § 8.)

Mack & Wright, for Respondent.

The Statute (W. S., 182, § 7,) and the bond contemplate only damages and costs, which accrue by reason of *the attachment*. If the damages and costs turn upon the defense to the *cause* of action, then they are not recoverable on the attachment bond.

EWING, Judge, delivered the opinion of the court.

This is a suit on an attachment bond, commenced in the Circuit Court of Greene county and taken by change of venue to the Circuit Court of Stone county. The petition, which is in the usual form, sets out by proper averments the attachment bond with its conditions, and assigns as a breach thereof that the defendant failed to prosecute said suit with effect, but that he voluntarily dismissed the same. Then follows the averment that by means of the premises and breach of the bond as aforesaid, the plaintiff has been injured and has sustained damages in the sum of four thousand dollars.* The answer admits all the material allegations of the petition, except the levy of the attachment on the goods, chattels and real estate of plaintiff. On the trial, which was by a jury, plaintiff read in evidence the answer of defendant, also the return of the Sheriff, showing a levy of the writ of attachment in the suit of McCracken against Blackman and others, on the real estate of James Blackman, the plaintiff in this suit.

The plaintiff then offered to prove by C. B. McAfee, an Attorney at Law, that he, plaintiff, had paid him seventy-five dollars as a fee in the defense of said attachment suit, and that it was necessary for the Relator to defend said suit and employ an Attorney for that purpose, and that the fee

paid was reasonable. This evidence was excluded on the objection of defendant, for the reason that there were no averments in the petition under which the evidence would be admissible; to which exceptions were saved. The plaintiff next offered to prove that he had expended a certain sum of money in traveling from the State of Texas, in the necessary defense of said suit, which was excluded on the ground before stated, to which defendant excepted. Plaintiff thereupon took a non-suit and filed motion to set it aside, which having been overruled, he brings the cause to this court by appeal.

The only question presented by the record is, whether the evidence offered and excluded was admissible under the averments of the petition? There is only a general allegation that plaintiff has been injured and has sustained damages in the sum of four thousand dollars.

Damages are either general or special. General damages are such as the law *implies* or presumes to have accrued from the wrong complained of. Special damages are such as really took place and are not implied by law. But when the law does not necessarily imply that the plaintiff sustained damage by the act complained of, it is essential that the resulting damage should be shown with particularity in order to prevent the surprise to the defendant, which might otherwise ensue on the trial. (1 Chitty Pleading, 396.)

The evidence offered by plaintiff was clearly inadmissible and was properly excluded.

From the nature of the breach assigned, and the wrong complained of, the defendants could not reasonably anticipate that they would be required to respond to plaintiff for expenses he had incurred, in traveling, from a distant State to the place of trial or for fees paid to Attorneys.

These are *special damages* for which he did not declare, and which he was very properly not permitted to prove.

The judgment of the Circuit Court is affirmed. The other judges concur.

 Owen v. Switzer.

RUSH C. OWEN, Appellant, *vs.* SAMUEL SWITZER, Respondent.

1. *Will—Life estate of widows—Sale of land by—Power—Execution of.*—By the terms of the will, a widow was vested with a life estate in all the property of the testator, and with a power to alienate any of it in payment of the debts of the estate, and to defray necessary expenses of the family. The widow also owned a small undivided interest in the land, in fee simple. The will also named her as executrix. *Held,*

1st. In the execution of the power she need not describe herself as executrix. Her power to sell would arise from the general trust reposed in her and not simply from her position as executrix.

2nd. Conveyance of land by her which contained no reference to the will or the power of alienation conferred by it, or to any thing from which the power might be inferred—would operate to pass only her life estate and her individual undivided interest in the land, and would not execute the power by transferring the fee simple title to the whole land sold, nor would such be the case even if the deed contained covenants of seizin and warranty.

Appeal from Greene Circuit Court.

Plaintiff asked declarations of law to the effect "That said Louisa T. Campbell under the said will took but a life estate in said lands; that her deed to Holland conveyed only a life estate, and such other as she had inherited from her children, who had died since her husband's death and before the delivery of said deed; that plaintiff was entitled to recover the lands sued for, except such portions of the same as Louisa T. Campbell had inherited from her children." * * * * Which instructions the court refused to give, and plaintiff excepted. The court then declared the law as follows: "That the deed from Louisa T. Campbell to Colby B. Holland, read in evidence by defendant, passes the fee of the estate in controversy to Colby B. Holland.

McAffee, Phelps & Mitchel, for Appellant.

When Louisa T. Campbell made this deed to Holland, she had a life estate in the land, and was an owner of an undivided interest in fee simple, as a tenant in common with her children. She executed a simple deed without reference to the *will or any power in her vested*, or reference to her fiduciary capacity. What is the legal effect of this deed? Was it an execution of the

power which respondent claims is contained in the will, authorizing her to dispose of the fee?

The uniform test is, that if the deed would be wholly inoperative unless taken in execution of the power, the maker will be considered as having intended to execute it, although no reference to the power is made. *But if there be any legal interest on which the deed can attach, it will not execute the power.* (2 Washburn Real Property, 2 Ed., page 324; last clause of section.) 1 Sudg. Pow., (Ed. of 1856), top p. 454-5-6-7, 477; 2 Sto. Eq., § 1062; (6th Ed.) 4 Kent's Com., 334-335; Doe vs. Roake, 5 B. & C., 720, 731-2, and last clause of opinion on page 734. (This opinion was affirmed in the House of Lords.) Hazel vs. Hagan, 47 Mo., 280-281; Blagge vs. Miles, 426, 1 Story, 446-447. This case Mr. Kent says, is a leading case in America on Execution of Powers, as is the case of Doe vs. Roak a leading case in England. Mory, Administrator of Michael vs. Michael, 18 Maryland, 227; see Lee vs. Vincent, Cro. Eliz., 26; Bradish vs. Gibbs, 3 Johnson's Ch., 551. In Hay vs. Mayer, 8 Watts, (Pa.) 203; Collier will case, 40 Mo., 287, 328, 329, 330; Pease vs. Pilot Knob Iron Co., 40 Mo., 124.

The deed of Mrs. Campbell to Holland in the case at bar, is operative without being taken in execution of the power; it passed the life estate devised to her by the will, and also the interest she had inherited from her daughter, Mary Sprowl, who died without issue before delivery or execution of the deed to Holland. And the fact of the deed of Mrs. Campbell being a warranty deed, cannot change the rule and test contended for by appellant. The deed in Pease vs. Pilot Knob Iron Company, 49 Mo., 124, was a general warranty deed; see also, Hay vs. Mayer, 8 Watts, 203.

And while the authorities generally agree that "it is a question of *intention* as to whether a power is executed or not, still, they also agree that the intention to execute must be apparent and clear, so that the transaction is not susceptible of any other interpretation. If it be doubtful under the circumstances, then that *doubt* will prevent it from being deemed an

execution of the power. (Blagge vs. Miles, 1 Sto., 446, and authorities before cited.)

In this case the intention can only be gathered from an inspection of the deed itself, and it will hardly be contended that any evidence can be found upon the face of the deed of an intention to execute a power.

Hardin & Ellis, for Respondents.

The following provision in the will, raises a power in the Executrix, Mrs. Campbell, to sell the lands belonging to the estate in order to pay its debts.

"I do hereby appoint my dearly beloved wife Louisa T. Campbell, my whole and sole executrix, to this my last will and testament, to manage and control as she may think proper, *my just debts first to be paid.*" (2 Sto. Eq., § 1246; 2 Jarm. Wills, 512, *et seq.*; Foster vs. Craige, 2 Dev. & Bat., 209; 1 Sto. Eq., 428, *et seq.*)

The will contains the following language:

"I do hereby will and bequeath to my wife, Louisa T. Campbell, all my property, real and personal, monies and effects of whatsoever nature they may be, owned by me or belonging to me, during her natural life, to use, manage, and dispose of as she may see proper, *though the property is never to go out of the family in any other way than to pay debts, or for the ordinary expenses of the family.*" This clause vested in the wife absolutely a fee simple title to the lands, or it conferred on her power to raise money to pay debts, and support the family. It amounts to a charge on all the property, and raises a trust in her which constitutes a power coupled with an interest. (12 Curtis, 240-3; 14 Curtis, 539; 1 Gray, 567; 17 Mo., 117.)

Under this clause she had a life estate, coupled with a power to convey a fee simple for the payment of debts and support of the family. (Norcum vs. D'Oench, 17 Mo., 99.)

The use of the words, "dispose of" in conferring a power, authorizes the donee of the power to execute a deed in fee simple. (Ruby vs. Bartlett, 12 Mo., 1; Norcum vs. D'Oench, *ubi supra.*)

A deed purporting to convey a fee, executed by one having a life estate with power to dispose of the fee, will be held to be made by virtue of the power, although the power is not referred to in the deed. (*Blagge vs. Miles*, 1 Sto., 427.)

In the opinion in that case, Judge Story says the question is one purely of intention. "If the donor of the power intends to execute, and the mode be in other respects unexceptionable, that intention, *however manifested*, whether directly or indirectly, positively or by just implication, will make the execution valid and operative. This language and rule were adopted by this court in the *Collier Will* case. (40 Mo., 330, and 47 Mo., 280.)

"This is a question of intention whether the party meant to execute the power or not; formerly it was sometimes required that there should be an express reference to the power; but that is not necessary now. The intention may be collected from other circumstances, as that the instrument includes something the party had not otherwise than under the power; that a part would be inoperative, unless applied to the power,"

When a deed cannot operate but as the execution of a power, it will be so held. (*Reilly vs. Chouquette*, 18 Mo., 229.)

The true and only reasonable doctrine is the one laid down by Sugden, in his "Comments on Sir Edward Clevis' case." "An intent, apparent on the face of the instrument, to dispose of *all* the estate would be deemed a sufficient reference to the power to make the instrument operate as an execution of it, inasmuch as the words of the instrument could not otherwise be satisfied." (1 Sugden Powers 460-461, and 468;)

The deed from Mrs. Campbell to Holland, purports to convey not a life interest, but a title in fee; the words cannot be satisfied otherwise than by referring the deed to the power.

This being a question of intention, as manifested by the deed, we must presume that the grantor intended to do that which she actually did, viz., *convey* the fee; such being the intention, it can only be satisfied by a reference to the power.

It is contended that unless a deed would be *wholly* inoperative, it will not be considered an execution of the power.

But the difference between a deed wholly inoperative, and one partially inoperative, is a difference only in degree, and not in principle.

VORIES, Judge, delivered the opinion of the court.

This was an action of ejectment brought by the appellant against the respondent to recover a tract of land in Springfield, Greene County, Missouri. The answer of defendant admitted the possession of the land named, but denied the other allegations of the petition. Both parties claimed title to the lands in controversy through John T. Campbell, (now dead,) the appellant as an heir, and through the heirs and devisees under the will of said Campbell. The respondent claims through a deed purporting to convey the land in controversy to Colby B. Holland, executed by Louisa T. Campbell, the widow of the said John T. Campbell and the executrix of his will, and by deed from said Holland to respondent.

It was admitted by the parties, that John T. Campbell died in 1812, leaving eight children and one grand-child as his only heirs. That Louisa T. Campbell, the widow, died the 28th of May, 1866; that three of the children died without issue before the death of their mother, and that the widow never again married.

It was further admitted that three of the children conveyed their interest in said land to appellant since the death of their mother, and that Mary Sprowl, one of the children died without issue before the execution of the deed to Holland by said widow through whom Respondent claims title to the land sued for. There is no question about the facts in this case. The rights of the Respondent depend upon the construction of the last will of John T. Campbell, and the deed from the said widow to said Holland. It is contended by the Respondent, that by the last will of said Campbell, a power was conferred on the said Louisa T. Campbell, his widow, to convey the land in controversy in fee simple to such person as she might choose, and that the deed executed by her to Holland, was a good execution of that power, and had the effect to convey the title to said lands in fee simple to him.

If these propositions are true, the court below properly rendered judgment in favor of the Respondent. If they are not true, judgment should have been rendered in favor of the appellant, and the judgment rendered, should be reversed.

The will of Campbell was as follows:

"1st. I do hereby will and bequeath to my dearly beloved wife, Louisa T. Campbell, all my property, real and personal, moneys and effects, of whatsoever nature they may be, owned by me or belonging to me, during her natural life to use, manage and dispose of as she may see proper, though the property never to go out of the family in any other way than to pay debts or for the ordinary expenses of the family. And further, should she in her wisdom, think proper to marry after my death, then and in that case, all my property to be equally divided among my children, including our grand-child, Louisa Ann McKinney, daughter of our dearly beloved Tabitha C. McKinney, dec'd, after reserving to herself during her life-time, the homestead on which we now live, and all the lands adjoining it, and a child's part of all my other property both personal and real, in addition to the household and kitchen furniture, and at her death to revert to, and be equally divided among my children, including Louisa Ann McKinney. And I further make it entirely optionary with her as to the amount of property she may in her wisdom give to any of our children as they may marry, and become of age; but not to give to *none* of them, any amount exceeding a child's part or an equal *pro rata* as near as may be of the amount of property then on hand, after deducting therefrom a fair proportion for raising and educating the minor children.

"2nd. I further wish and will that my dearly beloved wife Louisa T. Campbell have full power and authority to entail to any of our children and their heirs, any amount of property she may see proper to bestow on them by deed, gift, trust or otherwise, including Louisa Ann McKinney.

"3rd. I do hereby appoint my dearly beloved wife Louisa T. Campbell, my whole and sole executrix to this, my last will and testament, to manage and control as she may think proper, my just debts first to be paid."

It is said by Sugden on Powers, (Vol. I, 118) that "No precise form of words is necessary. Powers, we have seen, are mere declarations of trusts, and therefore any words, however informal, which clearly indicate an intention to give or reserve a power, are sufficient for that purpose." It is impossible to look at the will in question, without seeing the intention of the testator. He clearly intended to bequeath to his wife, a life estate in all of his real and personal property subject to, and charged with the debts of the testator. He also clearly intended to confer on her the power to sell and dispose of any of the property, either real or personal, when in her discretion, it should become necessary, in performing the trust imposed on her by the will, to pay the debts or to defray the ordinary expenses of the family. The power to dispose of the property for these purposes was left to her discretion, and not necessarily conferred on her in her official character as executrix, but conferred on her in consequence of the confidence reposed in her as his wife and the mother of his children, who were committed to her care and protection.

In the execution of this power, it was not necessary that she should describe herself as the executrix of the will. She might, in fact, have executed the power without ever qualifying as executrix. In the case of *Hazel vs. Hagan*, (47 Mo., 277.) the will of Hughes was very similar to the one under consideration. By his will, he bequeathed a life estate to his wife, authorized her to sell and dispose of his lands, etc., for the support and education of his children, and appointed her as executrix of the will. The wife after fully administering the estate and making final settlement, sold and conveyed part of the land, and although she had ceased to act as executrix and did not pretend to act as such, it was held that the sale was a good execution of the power. Judge Wagner who delivered the opinion of the court remarking in his opinion that "If the authority to sell be given as a trust to the same person named as executor, his resigning the trust as executor does not impair his power to sell." And in such case, it is well settled by the authorities referred to by the respondent, that where

the power is a general one to pay all debts or for any other general purpose, the purchaser from the donee of the power, need not inquire as to whether there are debts or whether the other general facts exist which are the objects of the power, particularly in a case like this, where these matters are left to the discretion of the person executing the power.

But the important question in this case is, was the deed executed by Louisa T. Campbell to Colby B. Holland properly construed by the court below to be a good execution of the power conferred by the will? This is a more difficult question. The deed from Mrs. Campbell to Holland is an ordinary deed executed in the usual form, purporting to convey the entire title to the four and a half acres of land in controversy to Holland in fee simple, also containing a covenant of seizin with the other general covenants of warranty.

The deed makes no reference to the will or the power conferred on the grantor to convey, or anything else from which it could be remotely inferred that the conveyance was being made by virtue of, or in execution of a power of any kind; but it simply conveys the land as the land of the grantor.

It is admitted that at the time of this conveyance, Mrs. Campbell had a life estate in said land, and owned a very small part or portion of it in fee simple. The authorities do not all agree in reference to what construction should be given to a deed executed in the manner, and under the circumstances above stated. Judge Story in his work on Equity Jurisprudence, (2 Vol. § 1062) states the rule to be that: "In the execution of a power, the donee of the power must clearly show that he means to execute it either by a reference to the power or the subject matter of it, for if he leaves it uncertain whether the act is done in execution of the power or not, it will not be construed to be an execution of the power.

In the case of *Blaggs vs. Miles*, (1 Story Reports, 427,) where the execution of the power had been by will, Justice Story in delivering the opinion of the court, says that, "While the authorities might not be reconcilable with each other, yet the principle furnished is, that if the donee of the power intends

to execute, and the mode be in other respects unexceptionable, that intention, however manifested, whether directly or indirectly, positively or by just implication, will make the execution valid and operative." "I agree, (says Judge Story,) that the intention to execute the power must be apparent and clear, so that the transaction is not fairly susceptible of any other interpretation. If it be doubtful under all the circumstances, then the doubt will prevent it from being deemed an execution of the power." In that case the will would have been wholly inoperative as to part of the property bequeathed, unless it were considered as being in execution of the power. I was held that the intention sufficiently appeared. In *Sudgen on Powers*, referred to by respondents' Attorney, it is held to be a question of intention to be gathered from the circumstances of the case, whether the instrument is to be construed as an execution of the power or not. The question, however, is what rule shall we adopt, or can any rule be adopted which will cause some uniformity of decision in such cases? Or shall we have no rule on the subject, and let each instrument be considered an execution of the trust or not, according to the opinion, as to the intent, of each judge who tries the case.

In the case of *Mory vs. Michael*, (18 Maryland, 227,) the rule is stated to be that, "The intention to execute a power of appointment by will must appear by a reference in the will to the power or to the subject of it, or from the fact that the will would be inoperative without the aid of the power." In that case the will did not refer to the power nor to the subject of it, and as the donee of the power had a small interest in the matter conveyed, upon which the will could operate, it was held to be no execution of the power. The same rule is laid down in 8 Watts, 203, and in other cases to which reference might be made. In this State, where the question has been considered, the adjudications have been consistent with, and I think uphold and recognize the rule laid down in Maryland. In the *Collier Will* case, (40 Mo., 287,) the donee of the power in her will made a direct reference to the power in these words. "Including any and all rights acquired by me

under the will of my late husband." The court held this to be sufficient evidence of an intent to execute the power. In the case of *Hazel vs. Hagan*, (47 Mo., 277,) before referred to, the power was executed by deed in which the will is mentioned, and a direct reference made to the provisions authorizing the sale. This was also held to be sufficient evidence of an intention to execute the power. It is, however, contended by the respondent in this case, that the deed from Mrs. Campbell to Holland having the covenant of seizin and of general warranty, it cannot be claimed that her only intention was to convey a life estate or any less estate than the fee simple title to the whole of the land included in the deed; that such conclusion would be wholly inconsistent with the covenants in the deed and hence the only reasonable inference is that she intended to execute the power. This argument seems to have some force, but the rule seems to be that, "If there be any legal interest on which the deed can attach, it will not execute the power," and I think it is unusual for conveyancers to insert covenants of seizin and other covenants of warranty in deeds made in the execution of a power; such deeds generally only profess to convey such estate as the donee of the power can convey by virtue thereof. Hence I think the argument proves as much in favor of the one construction as the other. This point, however, seems to have been considered in the case of *Pease vs. Pilot Knob Iron Company*, (49 Mo., 124,) that was a case similar in principle with the one under consideration. It was an action of ejectment. The plaintiff claimed through a mortgage executed in 1835, by James Johnson to James Rolfe and Andrew Jamison, and a subsequent conveyance by the mortgagees. The mortgage deed conferred power on the mortgagees, upon default, to sell the land at either private or public sale. They sold the land and conveyed by a deed containing covenants of warranty. The plaintiffs claimed that under this deed there was no reference to the power in the deed.

Judge Bliss, who delivered the opinion of the court in that case, uses this language: "In executing a power of sale the

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conveyance, to be regular, should recite or refer to the power. This is a rule, and conveyancers should not disregard it. Still the omission of such recital or reference will not vitiate an attempted execution, provided that it be plain that it was the intention of the party to execute the power. It is a question of intention as shown by the instrument. It is presumed that one who executes a conveyance designs to perform a valid and effective act, hence the ordinary test, that if the instrument would be wholly inoperative unless taken as an execution of the power, the maker will be considered as having intended to execute it, although no reference to the power is made; but if there be any legal interest on which the deed can attach, it will not execute the power." It was further held in that case that the legal estate being in the mortgagees subject to the right of redemption, their deed could attach on this legal estate, and that the deed would therefore be construed to convey this legal estate in the same plight in which it was held by the mortgagees, and could not be construed to be an execution of the power. I think that the rule laid down in that case will tend to produce uniformity of decision in this State on that subject, and I can see no reason to depart from it in this case.

Hence the declarations of law given and refused by the court below in this case, as well as the judgment rendered for the respondent, being in conflict with this view of the law, the same ought to be reversed.

The other Judges concurring the judgment is reversed and the cause remanded.

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J. F. HARDIN, Plaintiff in Error, *vs.* J. S. PHELPS *et al.*,
Defendants in Error.

1. *Evidence—Fraud—Link in chain of testimony.*—It is no error to exclude testimony, which is of value only as a link in a chain of evidence required to make out a defense of fraud, and is unsupported by such other testimony.

*Error to Greene Circuit Court.**Hardin & Ellis*, for Plaintiff in Error.*Sherwood and McAfee, & Phelps*, for Defendants in Error.

ADAMS, Judge, delivered the opinion of the court.

This was an action of ejectment for lands in Greene county. There were numerous deeds and documents read in evidence to show title in one John A. Miller, under whom both parties to claim. Both parties claim title from Miller, by virtue of execution sales and sheriff's deeds. The sheriff's deed, held by the defendants, was made to John S. Phelps under execution sale on older judgments than the sale and deed under which plaintiff claims. After the defendants had introduced the sheriff's deed to Phelps, the plaintiff proposed to attack it as being made by a fraudulent combination between Phelps and John A. Miller, to hinder and defraud the creditors of Miller, and to this end, introduced evidence tending to show that Miller, at the time of the execution sale, was largely indebted and in insolvent circumstances. He then introduced evidence of the facts and circumstances attending the purchase of this land by Phelps at execution sale, which were to the effect, that Phelps made the purchase without any consultation with Miller; did not know Miller in the transaction at all, but purchased with his own money but intended to let Miller's wife have it, she claiming it by another purchase made by her father with his own money.

Instead of conveying the land to Mrs. Miller, Phelps and his co-defendant bought her title to the land and now hold under both titles. There was contradictory evidence as to whether Phelps had proclaimed at the sheriff's sale, that Mrs. Miller owned this land by a prior purchase. This was in substance all the testimony in regard to the alleged fraud.

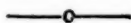
At the close of the evidence, the defendants moved the court to exclude from the consideration of the jury all the evidence tending to prove Miller's indebtedness, on the ground that when offered the defendants objected to it, and on the ground that it did not tend to prove the issues in the case, &c.

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This motion was sustained, and plaintiff took a non-suit, and afterwards moved to set the same aside, which was overruled and a judgment rendered against him, on the non-suit, and he has brought the case here by writ of error.

The only question presented by this record, is the action of the court in sustaining defendant's motion to exclude the evidence of Miller's indebtedness. This evidence was offered as the first link in a chain of evidence to be made out on the question of fraud in obtaining the sheriff's deed to Phelps. As no other evidence was offered or given to establish this fraud, in my judgment it was the plain duty of the court to exclude the whole of the evidence touching the allegations of fraud. There was not a particle of evidence of any fraud or fraudulent combination on the part of Phelps and Miller, or either of them. The court in my opinion committed no error in excluding the evidence or in overruling the motion to set aside the non-suit.

Judgment affirmed. Judge Sherwood not sitting. The other judges concur.



JAMES MCFARLAND, Plaintiff in Error vs. JAMES TUNNEL, Defendant in Error.

1. *Attachment writs.—Service by Elisor.*—Where there is no sheriff or coroner in the county, a writ of attachment may be served by an Elisor appointed by the court.

Error to Greene Circuit Court.

J. F. Hardin, for Plaintiff in Error.

L. P. Cunningham, for Defendant in Error.

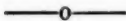
ADAMS, Judge, delivered the opinion of the court.

This was a suit brought by attachment in the Jasper Circuit Court, and taken by change of venue to the Greene Circuit Court. The attachment was issued in 1864, and levied on real estate. After the suit had been pending on plea of

abatement to the affidavit till 1870, a motion was filed to quash the writ of attachment because it had not been served by a sheriff. On the trial of the motion it appeared in evidence that the person who served the attachment, had been appointed Elisor by the Jasper Circuit Court in 1864, because there was then no sheriff or coroner in that county, and as such he served the writ. The court sustained the motion and also dismissed the suit. It seems to me this action of the court was without authority of law.

The judgment must be reversed and the cause remanded.

The other Judges concur.



THE MERCHANTS BANK OF MISSOURI and EMMA PLAYER,
Defendants in Errors vs. BYRD EVANS, et al., Plaintiffs
in Error.

1. *Land and land titles—Sales by United States Marshal under judgments at law—Must be made at a term of a Circuit Court—Act of Congress regulating process in United States Courts (1828).*—Under the act of Congress passed May 19th, 1828, (4 U. S. Stat. at Large, 288, § 3), which provided that writs of execution and other final process issued on judgments and decrees rendered in any courts of the United States, and the proceedings thereupon should be the same, except their style, in each State, as were then (1828,) used in the courts of such States, the United States courts have no right to make any regulations for the government of their Marshals in conducting sales under executions at law, different from those fixed by the State laws. There never has been any law of this State, authorizing execution sales of real estate to be made in vacation of the Circuit Court, and during a session of a County Court; but our laws have always required such sales to be made during the session of the Circuit Court, excepting under acts creating certain Courts of Common Pleas. It is essential to the validity of such sales, that they should be made during the session of the proper court, and a violation of this rule would render the sale void, not only in a direct, but also in a collateral proceeding.
2. *Execution Sales—U. S. Courts—Order of Court to execute deed of land at a term subsequent to the sale—Relation—Rights of third parties.*—An order of a court directing the successor of a Marshal who had made a sale, to execute a deed to the purchaser, is simply an administrative, not a judicial act, and if made at a term subsequent to the sale, although it would relate, as to the parties, to the time of the sale, it would not operate to cut out the intervening rights of a stranger without notice.
3. *Equity—Land and land titles—Cloud upon title, what constitutes.*—If a defect in a deed is such as to require legal acumen to discover it, whether it ap-

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pears on the face of the deed or proceedings, or is to be proven *aliunde*, it constitutes a cloud on the title which courts of equity have jurisdiction to remove.

4. *Land and land titles—Limitation—Adverse possession constitutes an affirmative title.*—Adverse possession for ten years is not only a bar as a limitation, but constitutes an affirmative legal title.

Error to Gasconade Circuit Court.

Charles Jones, for Plaintiffs in Error.

The United States Circuit Court has always had the right by the various acts of Congress from 1798 to the present time, to prescribe rules for its action, and to authorize the sale of real estate at a Circuit Court or County Court, and the rules of the court, clearly show it. Such has always been and is now the rule, and sales are constantly made at terms of County Courts. These rules have been recognized, and sanctioned by the United States Circuit Court, and by the Supreme Court of the United States, and are the law.

The courts of the United States, may by their rules not only alter the forms, but the effect and operation of the process whether mesne or final, and the modes of proceeding under it. (*Beers vs. Haughton*, 9 Pet., 329; 7 Pet., 360, 361; *Wayman vs. Southard*, 10 Wheat., 1; *Bank of United States vs. Halstead*, 10 Wheat., 51; *Pomroy vs. Manin*, 2 Paine, 476; *Catherwood vs. Gapete*, 2 Curtis, C. C., 94; *Beers vs. Haughton*, 1 McLean, 226; *Ross vs. Duval*, 13 Pet., 45; 4 U. S. Stat. at Large, 4, 279; *Kenerl vs. Shepley*, 15 Mo., 640; *Brightley's Digest*, 792, 793, *et seq.*)

E. P. McCarthy, for Plaintiffs in Error.

I. The Circuit Court of Gasconade or Franklin County, has no power to review and vacate the process, orders and instruments of the Federal Court.

The act of the Marshal in making the deed is the act of the court. "State Courts are exempt from all interference by the Federal Tribunals, but they are destitute of all power to restrain either the process or proceedings in the National Courts. Circuit Courts and State Courts act separately, and independently of each other, and, in their respective spheres of action, the process issued by one is as far beyond the reach

of the other as if the line of demarkation between them, was traced by land marks and monuments visible to the eye."

Riggs vs. Johnson County, 6 Wall., 195-6.

State Courts have no power to restrain or prevent the execution of any process of the Federal Courts, on any grounds whatever.

And even where the process is attachment, and levied on property of third parties not defendants in the writ and in no wise connected with the suit, the State Court cannot interfere.

Freeman vs. Howe, (24 How., 457 and cases cited.)

II But even if the Circuit Court had the power or jurisdiction to review these proceedings in a proper case, the Circuit Court erred in granting a decree in the case vacating the Marshal's deed. The sole question was upon the sale being at a term of County and not Circuit Court, it being conceded under the evidence, that the allegation of payment is out of the case.

And upon this only remaining point against the deed, plaintiff's proof is simply the deed itself. If the deed is void at all under the evidence in this case, it is void upon its face.

It recites that the sale was made during the sitting of a stated term of a County Court. There is no evidence in this case that that sale was made at the County Court sitting, &c., except the return of the Marshal to the execution, and that is recited in the deed. If therefore, this objection to the Marshal's sale is well taken, this case falls within the settled rule of cases in which Equity will not interfere. (Janney vs. Spedden, *et al.*, 38 Mo., 401; Ewing vs. City of St. Louis, 5 Wall., 418; 2 Sto. Eq. Jur., § 700, and cases cited in note; Peirsoll, *et al.* vs. Elliott, 6 Pet., 95.)

III. Plaintiffs action was barred by the statute of limitations, which was pleaded by defendants.

Hitchcock, Lubke and Player, for Defendants in Error.

The sale by the U. S. Marshal was made at a term of the County Court of Franklin County, and not at a term of the Circuit Court, and for that reason was illegal, irregular

and void; and the deed made thereunder and which is now sought to be set aside, is void and passed no title.

Under the act of Congress passed May 8th, 1792, (1 U. S. Stat. at Large, p. 276 § 2.) the U. S. Courts had the power to make any regulations they saw fit in regard to final process by rule. This law of 1792 remained in force until May 19th, 1828 when Congress passed "an act further to regulate process in the Courts of the United States." (4 Stat. at Large p. 281 § 3) by which it was provided, "That writs of execution and other final process issued on judgments and decrees rendered in any Courts of the United States, and the proceedings thereupon, shall be the same, except their style, as are now (1828) used in the Courts of such States, saving to the Courts of the United States in those States in which there are not Courts of Equity, with the ordinary Equity jurisdiction, the power of prescribing the modes of executing their decrees in equity by rules of Court. *Provided, however,* that it shall be in the power of the Courts if they see fit in their discretion, by rules of Court, so far to alter final process in said Courts, as to conform the same to any change which may be adopted by the Legislatures of the respective States for the State Courts."

This last is the act which has uninterruptedly, from 1828 to the present time, regulated executions issuing from the Federal Courts and the proceedings thereupon.

In order to ascertain, then, what writs of execution and other final process issued on judgments at law in the United States Courts, and the proceedings thereon should be in any state at any given time since May 19th 1828, we must first see what they were in said states on the 19th of May, 1828. 2nd. Whether between that day and the day in question, any change in these respects had been adopted by the State Legislature for the State Courts. 3rd. Whether the United States Courts of that State had seen fit by their rules, to conform their final process to the changes made for the State Courts. (Conk. Treat., 3 Ed., pp. 317, 341, 460; Beers vs. Haughton, 9 Pet., 361, 362; Ross vs. Duval, 13 Pet., 45; The United States vs.

Knight, 14 Pet., 301; Amis vs. Smith, 16 Pet., 312; Duncan vs. Darst, 1 How., 309, 310; McCracken vs. Hayward, 2 How., 608; Riggs vs. Johnson County, 6 Wall., 190; Smith vs. Cockrill, 6 Wall., 756; Evans vs. Riehl, 10 Mo., 433.)

The cases of Kenerl vs. Shepley, 15 Mo., 640, and Keene vs. Barnes, 29 Mo., 378, can have no application to the case at bar, because the Marshal's sales therein considered, were made long prior to 1828, and under the earlier laws of Congress which were essentially different from the law of 1828. The same remark applies to the cases of Wayman vs. Southard, and Bank vs. Halstead, 10 Wheat., 1 and 51.

The judgments under which the United States Marshal made the sale in question to Evans, were judgments rendered in common law suits.

At the time when the law of 1828 went into effect the laws of Missouri required, that "When any lands and tenements shall be taken in execution by any sheriff or other officer, it shall be his duty to expose the same to sale at the Court House door, on some day during the term of the Circuit Court of the county wherein they are situated."

This provision concerning the sale of lands under execution has remained a part of the law of this State from 1825 to the present day, and it is no empty quibble to require that the U. S. Marshals should make the time and place of these sales under execution correspond with those prescribed by the State laws.

The people know that sheriffs' sales generally take place at the Court House, during the session of the Circuit Court, and they go there at that time for the purpose of seeing what property is to be sold, and to make purchases. Again, they look for the advertisements and notices of sale, when the sales are to take place at the Court House in term time, because they are expected, when a sale at another time in a different town before an inferior tribunal, would escape the observation of all except those who are especially interested. (*Mers. vs. Bell* 45 Mo. 335.)

This Court has jurisdiction to declare null and void the deed of the Marshal in question.

Much stress seems to be placed by the plaintiffs in error, upon the fact that the deed recites that it was made under authority of an order of Court. This order was simply an authority given by the Court to the Marshal to execute a deed for land sold by his predecessor, and the only thing necessary to obtain it was that the purchaser at Marshal's sale should satisfy the Court that he had paid the money bid. It was made without notice to any one, and was simply one of those formal orders of Court, provided for in our execution laws in cases where a sheriff has died after sale and before making a deed. It is provided simply because the new sheriff cannot know what was done during the life-time of his predecessor. A deed made under such order, has no other or greater force or authority, than one made without such order by the sheriff or marshal who made the sale.

The acts of the United States Marshal in selling under execution, are simply ministerial, and the State Courts have a right to set aside void deeds made by him. And the order of Court makes no difference.

ADAMS, Judge, delivered the opinion of the Court.

This was an action in the nature of a bill in equity, commenced in 1864 in the Circuit Court of Franklin County and taken by a change of venue on the application of defendants to the Gasconade Circuit Court.

The petition, in substance, alleges that the plaintiffs are owners in fee of certain lands in Franklin County which are described in the petition.

The petition sets forth the title under which plaintiffs claim, by which it appears that these lands originally belonged to various parties trading under the firm name of the "Missouri Mining and Smelting Association"—that one Brown obtained a judgment against said parties in the Franklin County Circuit Court, under which he caused the land to be regularly sold at execution sale, and bought them and took a Sheriff's deed for them and entered into possession thereof, and by mesne conveyances from him the plaintiffs claim title, and claim that they and those under whom they claim have

been in continuous possession ever since the execution sale and deed, which was made in 1846.

The petition further alleges that Augustus H. Evans, deceased, the ancestor of the defendants, and another party had obtained judgments in the Circuit Court of the United States at St. Louis, which had been paid off but were fraudulently kept on foot without full satisfaction being entered. And that the said Augustus H. Evans fraudulently caused executions to be issued on said satisfied judgments and had them levied on the same lands, and that under these satisfied judgments and executions the then Marshal (Birch) sold the lands during the session of the County Court of Franklin County, and when the Circuit Court was not sitting.

That this sale was made before the sale under which plaintiffs claim; that at the time the said Brown purchased he had no knowledge or information that such sale had taken place, and the plaintiffs purchased without any notice thereof; that subsequently to the purchase made by Brown, Marshal Birch having been removed from office his successor Robert C. Ewing under the order of the United States Circuit Court executed a Marshal's deed to Augustus H. Evans for said lands so bought by him under said executions.

The plaintiffs set up, not only that this Marshal's deed was fraudulently obtained as aforesaid, but that the Marshal's sale and deed are void, because such sale was not made at a session of the Circuit Court but at a session of the County Court.

The petition asks that this Marshal's deed be set aside as a nullity, and that the title be divested out of the defendants, who are heirs at laws of Augustus Evans, deceased, and invested in plaintiffs.

The answer denies the material allegations of the petition in regard to plaintiffs being owners of the land, and denies all fraud on the part of their ancestor, and the answer charges that the Marshal's sale and deed to their ancestor, was valid; that under the rules of the United States Courts, these lands were properly sold at a session of a County Court; that under his purchase their ancestor took possession, and that he and

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they have been in continuous possession, and they set up this possession as a bar under the statute of limitations. The answer then asks for affirmative relief by way of counter-claim or cross-bill, and prays that the deeds and title set up by the plaintiffs may be set aside as clouds upon their title.

On the trial, the plaintiffs gave evidence tending to show that the judgment under which the ancestor of the defendants bought these lands had been paid off, and evidence conducing to show that after the purchase by Brown, the ancestor Evans congratulated him on his success, and set up no claim to these lands. There was also evidence given conducing to show that Brown took possession under his purchase, by renting out a field of some fifteen or more acres, and that this possession was continued, and kept up by the parties claiming under him.

The evidence does not show any continuous possession by the defendants or their ancestor. There was no evidence given, that the plaintiffs or those under whom they claim, had any notice of the Marshal's sale to Evans.

The defendants introduced evidence tending to show that the United States judgments were not satisfied, but that at least the costs remained unpaid when Evans purchased.

The Circuit Court found for the plaintiffs, and made a decree as prayed for in the petition, and the defendants excepted to its rulings, and have brought the case here by writ of error.

The first question raised by this record is the validity of the Marshal's sale and deed to Augustus H. Evans, the ancestor of the defendants.

Under the act of Congress of 1792, the United States Courts had the power to make such rules as they might deem proper in regard to final process and the proceedings of the Marshal thereon. This act remained in force until the 19th of May, 1828, when Congress passed "an act further to regulate processes in the courts of the United States." (4 Statute at Large, 288). By the third section of this act, it is provided that writs of execution and other final process issued on judgments and decrees rendered in any courts of the United States, and the pro-

ceedings thereupon, shall be the same, except their style, in each state as are now, (1828) used in the courts of such States, saving to the courts of the United States, in states in which there are not courts of equity with the ordinary equity jurisdiction, the power of prescribing the modes of executing their decrees inequity, by rules of courts. *Provided, however*, that it should be in the power of the courts if they saw fit in their discretion, by rules of courts, so far to alter final process in said courts as to conform the same to any change which might be adopted by the legislatures of the respective states for the State Courts.

The transcript in this case shows that the Marshal's sales in this case were made under judgments at law and not decrees in equity.

It will be seen that since the passage of the act of 1828, the United States courts have no right to make any regulations for the government of their Marshals, in conducting sales under executions at law, different from those required by the State laws.

They may conform them to such alterations as may from time to time be made by state laws.

This has been the construction of the act of Congress of 1828 by the Supreme Court of the United States ever since its passage. The question has arisen in numerous cases, and has uniformly been decided the same way by that court. (See *Beers vs. Haughton*, 9 Pet., 361; *Beers vs. Duval*, 13 Pet., 45; *United States vs. Knight*, 14 Pet., 301; *Duncan vs. Darst*, 1 How., 301; *McCracken vs. Hayward*, 2 How., 610; *Riggs vs. Johnson County*, 6 Wall., 190; *Smith vs. Cockrill*, 6 Wall., 756.)

Those cases decided by that court maintaining a different doctrine, arose under the act of 1792, and are not in conflict with the authorities above cited.

There never has been any law of this State, authorizing execution sales of real estate to be made in vacation of the Circuit Court and during the session of a County Court. Our laws have always required such sales to be made at the court house, during the session of the Circuit Court, except under acts cre-

ating Common Pleas Courts, they are allowed to be made during the sessions of the Common Pleas by the express or implied provisions of such acts.

The place and time of sale, as thus fixed by the laws of this State, must be observed in execution sales as a regulation of supreme importance. (*Jackson vs. Magruder, ante p. 55.*)

It is well known by the citizens, that sales of that character cannot take place at a County Court, and therefore a notice to that effect would be disregarded, and result in a ruinous sacrifice of property. In my judgment, it is essential to the validity of such sales that they should be made during the session of the proper court, and a violation of this rule would render the sale void, not only in a direct but also in a collateral proceeding.

In *Smith vs. Cockrill*, 6 Wall., 756, it was held by the Supreme Court of the United States in an action of ejectment, that a Marshal's sale and deed were void, when there was no appraisal of the real estate as required by the laws of Kansas.

If a Marshal can violate the law by selling at a County Court, why not suffer him to do so when no court at all is in session, or at a place where no courts are held? It seems to me that there can be no doubt about the invalidity of the Marshal's deed under consideration.

Yet the facts of this invalidity would not be manifest to persons unskilled in the law, nor even to the most skillful without close investigation of the several acts of Congress, and the authority of the courts to regulate such sales. And therefore the existence of such a deed would throw a cloud over the title of the real owner and render the land less salable.

It is urged with great vehemence by the learned counsel for defendants, that the order of the United States Circuit Court directing the successor, the Marshal who made the sale to execute a deed to the purchaser, was a judicial act of the court, and as such cured all prior defects.

This position, to my mind, is untenable. That order was made several years after the sale, and subsequently to the purchase made by Brown. It was made in the absence of all

parties, there being no presumption that they remained in court for any purpose. It was therefore, a mere *ex parte* proceeding, not in the nature of a judicial act, for there was nothing to adjudicate. This act of the court was simply administrative, the *ex parte* petition was presented, and the order followed as a matter of course. By this order the then existing Marshal was empowered to do only what his predecessor could have done without such order, if he had remained in office, and the deed made by him can have no more effect than the deed made by the previous Marshal.

A Sheriff's or Marshal's deed relates to the time of sale. But this rule is not allowed to operate so as to cut out the intervening rights of strangers without notice. It only relates as to the parties and their privies and purchasers without notice.

And therefore in this case if the Marshal's Deed was valid, it did not relate to the sale so as to affect the rights of the plaintiffs.

After the final trial and decree the question was raised by motion in arrest, that there was no equity in plaintiff's petition and the point is made here that their remedy if any, is complete at law.

I have already intimated that such a title as plaintiffs claim under, is sufficient to cast a cloud over the defendant's title and is such as would render their land unsalable in the market. I know that the authorities are somewhat conflicting in regard to what sort of titles constitute a cloud, so as to warrant a Court of equity to interfere and remove it. Some of the Courts hold, that if the defect is apparent on the deed, the law will not entertain jurisdiction; but I think that the weight of authority and reason sustain the position, that if the defect is such as to require legal acumen to discover it, whether it appears on the deed or proceedings, or is to be proven *aliunde*, Courts of equity entertain jurisdiction to remove the cloud. Wells vs. Weston (22 Mo., 384) was a bill in chancery to enjoin a sale and deed for taxes, which had been levied by the town of Weston under a legislative act, authorizing it to tax all real estate outside the town limits to the extent of half a mile.

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The bill was demurred to and the demurrer sustained. The only point relied on in the bill was that the Act of the Legislature was unconstitutional, and although the sale and deed would for that reason be void, it was urged in the complaint that such sale and deed would cast a cloud on the complainant's title. Judge Leonard delivered an able opinion holding that the law was unconstitutional, but reversed the judgment of the Circuit Court. In *Lockwood vs. City of St. Louis*, (24 Mo., 20,) the same point was made and decided the same way. That was an injunction to restrain the collection of taxes on real estate because of their illegality, and this Court sustained the jurisdiction on the ground that a cloud would be cast on the plaintiff's title.

The remarks of Judge Napton in *Gamble vs. St. Louis*, (12 Mo., 617,) are rather too broad and in conflict with the weight of authority, if he intended to be understood as holding in all cases where the defect appears on the face of the proceedings, a Court of equity will not interfere but leave the parties to their remedy at law.

In the case at the bar, the defendants are so well satisfied with their Marshal's Deed, that they set it up in their answer as valid, and ask for affirmative relief against the title relied on by plaintiffs, and pray the Court to set aside the plaintiff's deeds as clouds on their title.

It seems to me that such a title so relied on by defendants, is a sufficient cloud to give a Court of equity jurisdiction to remove it.

An objection is made to the form of the decree. There appear to be more lands embraced in defendant's deed than are covered by plaintiff's petition and deeds, and the decree not only sets aside the deed, but adjudges the whole of these lands to the plaintiffs. This was no doubt a clerical mistake, and the decree will be so modified here as to embrace only the lands claimed by plaintiffs in the petition, and that the defendants and those holding under them be forever enjoined from setting up said deeds against the plaintiffs and those holding under them. Although this form of judgment is not asked

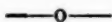
McClurg v. Dollarhide.

for in the petition, the fact, alleged therein and proved will warrant it.

There is nothing in the objection that the plaintiff, Emma T. Player, does not show a regular chain of paper title. Adverse possession for ten years is not only a bar as a limitation but constitute an affirmative legal title.

Upon the whole case, with the above modification in the judgment, it will be affirmed.

The other Judges concur.



Jos. W. McCLURG, Defendant in Error *vs.* WM. DOLLARHIDE, Plaintiff in Error.

1. *County Court—Execution and sale of lands made during vacation of Circuit Court.*—Under an execution issued from the County Court on a judgment of the County Court given for the principal and interest of a school debt under the statute of 1855, (see R. C. 1855 p. 14 25, § § 27, 29 and 30) a sale of land made during a session of the County Court, but while the Circuit Court was not in session, would be void either in a direct or a collateral proceeding.

Error to Hickory Circuit Court.

F. P. Wright, for Plaintiff in Error.

I. The law is well settled that where, by a regular judgment and execution, the sheriff is invested with the power to sell, any irregularity in selling on a day different from that directed by law for selling, and even without the proper notice, does not affect the title of a *bona fide* purchaser. It is sufficient for the purchaser that the sheriff had *authority* to sell, and did sell, and executed a deed; all other questions are between the parties to the judgment and the officer. (Draper *vs.* Bryson, 17 Mo., 86; Lawrence *vs.* Speed, 2 Bibb., 401; Webber & Stith *vs.* Cox, 6 Monroe, 110; Hobein *vs.* Murphy, 20 Mo., 448; Newton *vs.* State Bank, 14 Ark., 1-15; Brooks *vs.* Rooney, 11 Georg., 423; Sullivan *vs.* Hearn-den, Ib., 294.)

II. It is a principle of universal law, that every court of record has power to carry into effect its own judgments. It

directs the execution to issue, and has the sole control over the same. Sessions of the County Court are held every three months, while those of the Circuit Court were then held only once in six months; and it might be difficult to procure a valid sale at the session of the Circuit Court. Hence for obvious reasons, it is important that the sale should take place at the court which has control of judgment, execution and sale, and unless the law clearly and expressly directs and requires the sale to be made at a session of the Circuit Court, and clearly prohibits such sale at the County Court, a sale at the latter place is proper.

III. The reasoning of Judge Ewing, in the case of *Blanchard vs. Baker*, 29 Mo., 446, in which the regularity of a sale made by the Marshal at the Western Court of Common Pleas, was considered and decided, applies with all its force to this case, and is decisive in favor of the sale at the County Court.

The correctness of that decision has never been doubted.

The case of *Mers. vs. Bell*, is not in conflict with but rather sustains the above decision.

Young, McAfee & Phelps, for Defendant in Error.

I. The deed offered in evidence, shows that the proceeding under which the sale was made, was instituted under section 28 of Chap. 143, R. C. 1855. Under this section suits may be brought for the collection of interest and principal of such bonds, in any court of competent jurisdiction. The 29th section of said act provides that if the interest and principal of such bond does not exceed five hundred dollars, the same may be recovered in the County Court having charge of the fund.

II. The two last mentioned sections are the only sections in said act that authorize or provide for the collection of the interest and principal of the school fund, and neither of them authorize or empower the sheriff to sell real estate at the sitting of the County Court; but provide that judgment may be rendered against the defendant with like effect as judgment of the Circuit Court in any civil action, which of course would require the sale to take place during the sitting of the Circuit Court.

ADAMS, Judge, delivered the opinion of the court.

This was ejectment for land situated in Hickory County. Both parties claimed title under Alfred and W. D. Foster.

The plaintiff rested his case on a Sheriff's deed.

The defendant then offered a Sheriff's deed for the same premises, made under an execution issued from the County Court upon a judgment of the County Court, given for the principal and interest of a School debt under the statute of 1855, which was excluded because the sale appeared to have been made at the County Court and in vacation of the Circuit Court. The exclusion of this deed is the only point raised by this record.

Whilst it is the duty of the courts to protect purchasers at Sheriff's sales, it is also their duty to see that no injustice is done to the parties to the execution. We know of no provisions in our statutes authorizing a sale to be made of a debtor's land, under an execution like this, during the session of the County Court, and whilst the Circuit Court is not sitting. This execution was issued on a judgment of the County Court, recovered under section 29, Revised Laws of Missouri 1855, page 1425, by which such judgment is to have like effect as a judgment of a Circuit Court. Section 30, same page, provides for the foreclosure of a Mortgage, before the County Court, and provides that a copy of the order, foreclosing the Mortgage, shall have the same effect as a *fi. fa.* on a judgment of foreclosure in the Circuit Courts, and shall be proceeded on accordingly by the Sheriff. Section 27, on same page, provides for the recovery of interest on School debts, by issuing a warrant in the nature of a *fi. fa.*, a judgment of a Circuit Court, except that such warrant shall be returnable in thirty days from its date, and except also, that such Sheriff shall have power to sell during the sitting of the County Courts, &c.

These provisions taken together, clearly show that the only execution under which a Sheriff can sell lands during the sessions of a County Court, is the one in the nature of a *fi. fa.*, issued under section 27.

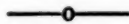
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The other executions, authorized to be issued from the County Court, have the force and effect and must be proceeded on in like manner, as executions issued by the Circuit Court. It is so well known that lands cannot be sold on executions except during the sessions of the Circuit Court, that a notice to sell at a County Court would be wholly disregarded, and a sale under such notice might be ruinous to all parties for want of bidders. If a Sheriff can disregard the plain provisions of the statute, by selling at a County Court, he might do so when no Court at all is in session, or at a place where Court is never held.

In my judgment, it is essential to the validity of a Sheriff's sale that the law in this respect should be pursued; and if it be violated the sale and deed are void whether the question is raised in a direct or a collateral proceeding; see Merchants Bank of St. Louis, *et al.*, vs. Byrd Evans, *et al.*, Mo. *ante* p. 335.

It is urged here that the plaintiff did not prove that the defendant was in possession, withholding the premises at the commencement of the suit. But the bill of exceptions does not present this point, as it no where appears that the evidence contained in the bill was all the evidence given. In the absence of anything to the contrary, we must presume that the judgment of the Circuit Court is right.

Judgment affirmed. Judge Sherwood not sitting. The other Judges concur.



STATE OF MISSOURI, *ex rel.* Circuit Attorney, Respondent, *vs.*
COUNTY COURT SALINE COUNTY, *et al.*, Appellant.

PER CURIAM.

1. *Injunction—Public corporation—Power of the State to restrain from the commission of unlawful acts.*—It is competent for the State, at common law through its officers, to maintain proceedings by injunction to restrain public corporations from doing acts in violation of the constitution and laws of the State. Section 24 of the statutes concerning Injunctions, (W. S., 1032,) which provides that "the remedy by injunction or prohibition shall exist in all cases where injury to real or personal property is threatened, and to prevent the doing of any

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legal wrong whatever, whenever, in the opinion of the court, an adequate remedy cannot be enforced by an action for damages," also applies to such cases.

2. *Railroads—Louisiana and Missouri River Railroad—Charter—Amendments—Construction—Constitution.*—The charter of the Louisiana and Missouri River Railroad Company, which was granted in 1859, authorized it to construct a railroad by a certain designated route "to the Missouri River at the most eligible point," and provided that it should "be lawful for the County Court of any county in which any part of the route of said railroad may be," to subscribe to the stock of said company. The new constitution, which went into effect in July 1865, provided that "the General Assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town at a regular or special election assent thereto." In 1868 the General Assembly passed an act, claimed to have the effect of amending the original charter, and authorizing the extension of the road to a point beyond the Missouri River, through counties south of the river not on the route of the road, as originally chartered. *Held*, that even if the act of 1868 was valid, and authorized such extension, yet, as the counties through which the extended part of the route lay were not on the route as designated in the original charter, they were bound by the provision quoted of the constitution, and were not authorized by the provisions of the charter to subscribe to the road, without submitting the question to a vote of the people. Such a construction would give to them powers prohibited by the constitution, which they did not possess at the time of its adoption.

PER SHEPLEY, Special Judge.

1. *Acts of General Assembly—Title.—No part of act—Must express all subjects of act—Parts of act not expressed in title, void—Special Legislation.*—An act of the General Assembly was entitled "an act to amend an act entitled an act to incorporate the Louisiana and Missouri River Railroad Company, by increasing the amount of the capital stock of said company, defining more explicitly the power of the Board of Directors to fix the Western terminus of the road, authorizing the location and construction of a branch road, and conferring upon said Board, the necessary powers to carry into effect the several objects contemplated by this charter; and also by striking out sections 11, 18, 27, 30 and 31 of said act." The act itself did not speak of the repeal of the original act, or any part of it, or any modification or amendment of it, nor did it mention the original act at all. *Held*, that said act could not create a new corporation under the prohibition in the constitution against special legislation; that the title is no part of the act, and that the language of its title alone could not operate as a repeal or amendment of the original act; and that such parts of the acts as are not expressed in the title are void.

PER WAGNER, Judge, Dissenting.

1. *Injunction—Public corporations—Power of State through its officers to interfere.*—Where the State in its corporate character and capacity, has no interest in the litigation, its interference to prevent the commission of an unlawful act by a public corporation, can only be permitted on the ground that the Attor-

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ney General or Circuit Attorney is legally authorized to interfere in all cases where private persons are held incompetent to sue, and where the rights of the whole people or any considerable number of them are in danger from the unlawful acts of persons acting or assuming to act under color of lawful authority or otherwise. Such interference under any other circumstances is not authorized by our statutes, which define the duties of the Attorney General and Circuit Attorney, nor is it warranted by Common Law.

2. *Acts of General Assembly—Titles of acts—Subject expressed in title—Constitution.*—Under the provisions of the constitution of this State, that no law enacted by the General Assembly shall relate to more than one subject, and that subject should be expressed in its title; but if any subject embraced in an act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed; (Const. Mo., Act. IV, § 32.) an act without a title would manifestly be a nullity, and therefore it follows, that the title forms and constitutes a part of the act, and if the title of an original act be sufficient to embrace the provisions contained in an amendatory act, it will be good, and it need not be inquired whether the title of the amendatory act would of itself be sufficient.

Appeal from Saline Circuit Court.

Sharp & Broadhead, for Appellants.

I. The Circuit Attorney has no authority to proceed in the name of the State in this case. (State vs. Parkville and Grand River R. R. Co., 32 Mo., 496; Atty. Gen. vs. Utica Ins. Co., 2 Johns. Ch., 371; see also, People vs. Miner, 2 Lansing, 396.)

In this last case, the doctrine is fully reviewed, the cases of Davis & Palmer vs. The Mayor, &c., 2 Duer., 663, and of Doolittle vs. The Supervisors, 18 N. Y., 162, referred to by the counsel for the Respondent, are referred to, and the Court holds that in such a case as the one before the Court the State is not a proper party.

II. The subscription made by the County Court of Saline County is valid and legal, and the issuing of the bonds and levying the tax were acts done in pursuance of law.

At the time this subscription of stock was made by the County Court of Saline County, the Railroad Co. was organized with authority to build a Railroad from Louisiana to the Missouri River at the most eligible point.

Even though under the original charter, the route of the road could not be through the County of Saline, it was clear-

ly within the power of the Legislature, to amend the charter, and extend the route of the road through the County of Saline. It was not a dead charter. The law was still in force which created the corporation. It had not expired by limitation, which was ten years from its date, (§ 26, p. 406, Sess. Acts 1858-9.) The power of amendment, not being prohibited by the Constitution, was just as broad after as before its adoption.

This charter was amended by the act of March 24th, 1868, by which the company was authorized to extend the route of the road through the County of Saline. This court has decided such legislation to be valid and constitutional. (*State ex. rel. Cir. Atty., vs. Cape Girardeau and State line R. R. Co.*, 48 Mo. 468.) The original charter was applicable to all Counties through which the route of the road should run. Section 3, of Art. XI. of the State Constitution declares that "all laws of the State now in force, not inconsistent with this constitution, shall continue in force until they shall expire by their own limitation, or be amended or repealed by the General Assembly."

The provisions of this charter were not inconsistent with the constitution, because its prohibitions in this respect, referred to future legislation, (*State ex. rel., The Missouri and Mississippi R. R. Co. vs. Macon County Court*, 41 Mo., 453.) The clause of the Constitution just quoted, has the effect of taking the provisions of the charter, authorizing County subscriptions to the stock of the Rail Road Company out of the operation of the 14th section of the same article of the Constitution, declaring that, "The General Assembly shall not authorize any city, county or town to become a stockholder in, or loan its credit to any company, association or corporation except by a vote of two-thirds of the qualified voters." This was not intended to have any controlling application to laws in existence when the Constitution was adopted. (*Macon Co.*, case 41 Mo. 453.)

The General Assembly by the act of March 25th, 1868, passed no new law on the subject of County subscriptions; it

merely extended the route of the road by an amendment to the charter—and that portion of the charter referring to County subscriptions attaches and applies to Saline County; it belongs to the charter and accompanies it wherever it may take the route of the road. The framers of the Constitution did not think proper to repeal existing laws in regard to the subscription of stock to Railroad corporations, although future legislation of the same kind was prohibited, and so they did not see proper to prohibit amendments to existing charters, and this power of amendment becomes as much a part of the Constitution, as if it had been inserted in so many direct words. (The People vs. Marshall, *et al.*, 1 Gilm. 672.)

Now this authority to subscribe under the charter of 1859, did not apply to any particular County, it was ambulatory, and could only apply when and after the company had located its road, so that really it was a part of the charter, *in fact* as well as in form.

The amendment, to be invalid, must not only be against the spirit, but against the letter, or within the positive prohibitions of the Constitution. (48 Mo., 468; Commonwealth vs. the Councils of Pittsburg, 41 Penn. St., 280.)

III. But the original charter authorized the company to make its road through the County of Saline.

The language of the charter is, "thence to the Missouri River, at the most eligible point, &c." The Missouri river was undoubtedly to be the Western terminus of the road, but no point was designated. The road was *actually located through the County of Saline*, at the time the subscription was made.

The western terminus was at the most eligible point on the Missouri river, for that is a fair interpretation of the language—it does not say on the north bank of the Missouri river, but the Missouri river at the most eligible point. (Moses vs. Pittsburg & Ft. Wayne R. R., 21 Ills., 522.)

"To the Missouri river" does not necessarily mean on the north bank of the Missouri river, especially when we see by the charter, that it was contemplated in the charter, that the road might cross the Missouri river. (Sess. Acts of 1859.

406 § 25.) The court will take notice that there is no other navigable stream which the road could cross on its route to the Missouri, from Louisiana on the Mississippi.

Thomas J. C. Flagg, for Appellant.

I. The state has no interest, equitable or otherwise, in the subject matter of this controversy. (*Sayre vs. Tompkins*, 23 Mo., 443; *State vs. Parksville and Grand River R. R. Co., et al.*, 33 Mo., 496; *Hopkins vs. Lovell*, 47 Mo., 102.)

II. There is nothing in the act of March 10th, 1859, creating this corporation, that limited the western terminus of the road to the north bank of the Missouri river.

Under the 35th section of that act, (Sess. Acts 1858-9, 407) the Railroad Company could have marked out, located and constructed their road to the south bank of said stream, or could have extended it to any point on the said river, and on either bank within the State of Missouri. The object of the act was not to fix the western terminus of the road at any definite point on the Missouri River. If it could have been located and constructed to a point on the south bank of the said river, and within the limits of Saline County, then the 29th section of the act of March 10th, 1859, would certainly have authorized the County Court of that County, to have made the subscription, because then, a "part of the route of said railroad," would have been, in the language of the act, within Saline County. But if the construction of the act 1859, contended for by Respondents, shall prevail, then it is submitted, that as the Company has authority by the 25th section of that act, to build their said road "over any stream or highway" in the State, with the simple condition that if it is located and built over a navigable stream, it shall be so done as not to obstruct the navigation of the same, it might still have crossed the Missouri river, and re-crossed it for the purpose of reaching any point selected by the Company for its western terminus. The point to be selected for this purpose, in the language of this act, is simply to be at "the most eligible point," on the Missouri river.

There is no prohibition against the crossing of that stream, and nothing in the act which justifies the construction given to it by the Respondents.

The record shows, that the road was, in point of fact, located from Louisiana to Kansas City previous to the making of the subscription, and it is so averred in the answer of appellants, and that Saline County was on the line of the road so located.

III. But if it shall be held that the subscription was not authorized by the act of 1859, it was clearly authorized by the amendment of the charter of said company, approved March 24th, 1868, (Sess. Acts 1868, p. 97, *et seq.*)

It is insisted that this amendment is clearly within the scope and meaning of the Constitution, and not repugnant to any of its provisions. The 3rd section of Art. XI, of the State constitution, provides that, "all statute laws of this State, now in force, not inconsistent with this constitution, shall continue in force, until they shall expire by their own limitation, *or be amended*, or repealed by the General Assembly."

There is no question, but that the language is broad enough to embrace the act of 1859. No exceptions whatsoever are made. The act of incorporation of the Louisiana and Missouri river Railroad company is not inconsistent with the provisions of the state constitution. (State *ex. rel.* Mo. & Miss. R. R. Co. vs. Macon Co. Ct., 41 Mo., 453; Cass vs. Dillon, 2 Ohio St., 607.)

IV. The act approved March 24th, 1868, amendatory of the act of March 10th, 1859, is in all respects in accordance with the provisions of the 25th and 32nd sections of Art. IV, of the Constitution of this state, (Const. of Mo., 48, 49.)

The title under these provisions becomes one of the most important parts of the whole act. In this case it sets out, with great clearness and distinctness the general scope and objects of the whole bill. There was no room for deception. It purports upon its face, to be an amendment of the act of 1859, and states in what particulars that act is intended to be amended. There is no inhibition against the revival or re-

enactment of a law, but simply against the manner of doing it.

It is clear then, that whether this case is to stand upon the act of 1859 or the act of 1868, in either case the subscription of the stock in question by the County Court of Saline County was authorized, and therefore legal and valid. This court held, in the case against the Macon County Court, above referred to, that an authority given by Legislative enactment to a County Court to make such a subscription of stock was not taken away by the adoption of the provision in the constitution, by which thereafter such subscription could be authorized, only by a vote of the people. No vote was necessary here under either act.

The power to amend, if properly exercised, carried with all of the powers, privileges and franchises that belonged to the original charter. The act retaining, in the amended act of 1868, the authority of counties, on the route of the road, to become stockholders in the company, is not to be treated then, as a new power vested by the Legislature by simply enabling the corporation to carry with it, to the full extent of the line of its road as necessary incidents, whatever properly belonged to its original charter. The Cape Girardeau and State line case, and the Macon County case, taken together, as they must be, clearly make the subscription of Saline County valid and legal.

Warner, Circuit Attorney, with whom was W. B. Napton, for Respondent.

I. The subscription of Feb. 7, 1868, by the County Court of Saline County was without authority of law and therefore null—for,

1. The Act of March 10, 1859, under which it purported to be made, did not authorize it. A road from Louisiana in Pike County to the Missouri River will certainly not run through Saline County, which is on the south side of the river.

2. Though this subscription was made under the Act of 1859, above referred to, yet as that act clearly did not authorize it, an effort is made to bring the subscription under the shelter

of an act passed on the 24th March, 1868, nearly two months after the subscription was made.

Upon this point my positions are,

a. If the subscription was not authorized, when made, under the act of 1859, it could not be subsequently ratified under the act of 1868, made after the new constitution, when the Legislature was deprived of authority to allow such subscriptions, except after a vote of the people.

b. The Act of March 24, 1868, is in direct conflict with sec. 32, of art. 4, of the constitution of Missouri, adopted long before the passage of that act. The act and its title do not correspond in any single particular. Its title indicates and declares it to be an amendatory law—the act which we find under the title is not and does not purport to be amendatory of any law. The first clause of it creates a company or corporation—and the 34 additional sections refer only and altogether to that company chartered by the first section. Throughout the entire law, from section 1 to section 34 inclusive, there is not one word of reference or allusion to, much less any specific mention of, the act of 1859, or any corporation chartered by that act. See the act *passim*, but especially sections 18, 21, 26, 33, 34, &c., in all of which it is said that this legislation is concerning “the said company hereby incorporated.”

Either the title of the act is a fraud, or the act itself is—as there is no connection whatever between the act and its title. Sec. 25 of art. 4, Const. of Mo., does not authorize the form of the amended act of 1868. (Cooley, Const. Lim., 151; Jones vs. Commissioners 21 Mich., 241.)

c. The 20th section of the act, under which alone the subscription could stand, if it has been made under and by virtue of this act, is, beyond doubt, so far as it applies to Saline county, in conflict with sec. 14, art. 11, of the Constitution. Admitting this act of 1868 to be a *bona fide* and constitutional amendment, the Legislature surely cannot repeal the Constitution by an amendment any more than they could by an original act. This 14th section has been construed by our Supreme Court as applicable to all legislation made after the Constitu-

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tion went into effect, and as this act or amendment of 1868 was long after the new Constitution went into operation, the decision of the court in the Macon County case determines such legislation conflicting with the 14th section aforesaid to be null and void. (State *ex rel.* M. & M. R. R. vs. Macon Co., 41 Mo., 453.)

d. The act of March 24, 1868, is also in conflict with sec. 4, art. 8, of the Constitution of Missouri. (*Ex parte* Pritz, 9 Iowa, 30; Davis & Bro. vs. Woolnough, *Ib.*, 105; Atkinson vs. Mar. & Lou., R. R., 15 Ohio, St., 21; Cooley on Const. Lim. and decisions of Kansas, Michigan, Iowa, &c., there cited.)

II. An injunction in the name of the State, suing through her proper legal officer, the Circuit Attorney for the circuit including Saline county, is the proper remedy. (Davis & Palmer vs. City of New York, 2 Duer, 663, *ib. s. c.*, 1 Duer, 479; Doolittle vs. Supervisors of Broome Co., 18 N. Y., 155; Roosevelt vs. Draper & others, 318; 16 How. Pr., 157; See British authorities cited in '2 Duer, 665; 50 Pa. St., 11; 54 Pa. St., 401; 34 Ills., 293.)

1. The County of Saline is a municipal corporation, capable of suing and being sued. The executive, legislative and administrative authorities of this municipal corporation are, under our laws, the County Court—a body which also is invested with and exercises some judicial functions. In this railroad subscription, however, as the Supreme Court has already determined in the application for a certiorari in this case, the County Court exercised merely administrative functions, and was not acting as a judicial body—and upon this ground alone the Certiorari was refused. And so too our Court has decided that a Prohibition lies only in judicial cases, or cases wherein judicial functions are exercised. (Vitt vs. Owens, 42 Mo., 512.) No appeal or writ of error lies, as is conceded on all hands, and the only remedies remaining, known to the law, are mandamus and injunction—the one being the counterpart of the other; the former being used to compel some administrative act, the latter to prevent it. The former, mandamus, was in the power of the railroad company, if they had desired to

enforce the issue of these bonds ; and our Supreme Court has on proper applications not only compelled the issue of bonds, but required the court to levy taxes to meet such obligations. (Flagg vs. City of Palmyra, 33 Mo., 440.) The latter is the only remedy to restrain the issuance of such bonds, where the subscription is unlawful and unconstitutional. (W. S., 1032.)

2. It is a mere mockery of redress to compel each tax-payer in the county to let his property go for the tax and drive him to his action of trespass. But whether this be so or not, it is clear that the tax-payer cannot resort to his Injunction, but the State, whose duty it is to see to the acts of all its municipal corporations, must interfere. The New York Courts, in the cases cited, discuss this subject thoroughly, and I leave it on their arguments. (23 N. Y., 318; 16 How. Pr., 137.) If an injunction does not lie, then the result is that there is no preventive redress, and tax-payers must wait till their property is levied on to pay the tax—an alarming and deep reproach to our judicial system, and especially to equity jurisprudence which delights in prevention rather than redress for past injuries. (W. S., 1032, § 24 ; State ex rel. Lex. & St. Louis R. R. vs. Saline county, 45 Mo., 248-9-10.)

3. The case of the State vs. Parkville & G. R. R. Co. (32 Mo., 497) does not conflict with the propositions assumed in this case. That was a private suit, brought by individual citizens, using the name of the State just as it is used in suits on administrator's bonds ; this application is made through her appointed attorney.

4. The authorities in New York and England, are decisive on the remedy by injunction, on the part of the State, through her legal attorney ; and there are no cases in this State on the point, and reason and public policy strongly urge in favor of this preventive remedy.

V. There is not a line, or word, or syllable in this charter of 1859, which indicates any intention to cross the Missouri River.

SHEPLEY, Special Judge, delivered the opinion of the Court

This is an action brought in the name of the State, by the

Circuit Attorney of the Sixth Judicial circuit, against the County Court of Saline county and its judges and the Collector of Saline county, to restrain the County Court and its officers from issuing bonds to the Missouri and Louisiana Railroad Company, or any county warrants, in payment of their subscriptions to the capital stock of that company, and from the levying or collecting any taxes for the purpose of paying such bonds or the coupons thereon or such warrants.

The petition sets forth, that on the 7th day of February, 1868, the County Court of Saline county undertook to subscribe four hundred thousand dollars to the capital stock of the Louisiana and Missouri River Railroad Company; that the said railroad company was incorporated in 1859, and by the terms of its charter it was provided that "it should be lawful for the County Court of any county, in which any part of the route of said railroad may be, to subscribe to the stock of said company." That the route of the railroad, designated in that act, was a route wholly on the north side of the Missouri river, and did not run through or into the county of Saline on the south side of the river. That the County Court of Saline county, did on the 7th day of February, 1868, make its subscription, professing to act under the permission given by the act of 1859. That this was done without ever having submitted the matter to the voters of Saline county for their assent, and was in violation of the 14th section of the 11th article of the Constitution of the State. That after the subscription was made, and on the 14th of March, 1868, the Legislature passed an act purporting, by its title, to be an act amendatory of the former charter of the railroad company. That this act is void, as conflicting with the 4th section of the 8th article of the Constitution and with the 32nd section of the 4th article, and that the 20th section of the act, if valid, conferred no authority upon the County Court of Saline county to subscribe for stock. That their subscription was without any authority of law, was an usurpation of power, was at variance with the letter and spirit of the Constitution, and of the laws of the State. That the County Court have already is-

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sued some bonds to pay for the subscription, and threaten to issue others. That the County Court have assessed and levied taxes for the purpose of paying the bonds and interest, and have included the tax so assessed in the general county taxes against the individual tax-payers, so that it cannot be separated, and that the whole scheme was a fraud upon the tax-payers. That if any remedy existed at all to the tax-payers, it is by a multiplicity of suits by each tax-payer for himself. That the tax-payer cannot tell what part of the tax assessed against him is illegal; praying that the County Court and its officers be restrained from issuing any more bonds or warrants for that purpose, and that the officers and collector be restrained from levying, assessing, or collecting taxes for the payment of such bonds or warrants, or the interest thereon.

The defendants answered, denying the illegality of their action in the matter of the issue of these bonds, claiming that they had full power to make the subscription, under the original charter of the railroad. That the route, as designated in that charter, was not wholly or exclusively on the north side of the Missouri river, but that the directors had the authority to locate the route from Louisiana to any point in the State of Missouri, whether on the north or south side of the river; and that before the subscription the directors had located it from Louisiana to Kansas City. That Saline county was on the route of the road thus located.

They deny that the act of the 24th March, 1868, called the amendatory act, is void or in conflict with the Constitution of the State, or the subscription illegal or the bonds void.

The case was heard upon the petition and answer without further proof, and the court made the preliminary injunction perpetual, and the defendants appealed.

The question that lies at the threshold of this case, is whether such a proceeding as this is, can be maintained by the State.

It is asserted by the plaintiff that it is competent for the State, through its authorized officers, to institute this proceeding to restrain public corporations from doing acts in violation of the Constitution and laws of the State.

On the part of the defendants, it is contended that the Attorney General or the Circuit attorneys, in their respective districts, have no authority by statute to institute such a proceeding in the name of the State. That if such power exists at all, it exists by virtue of the common law, and that by the common law such interference on the part of the State is confined to two classes of cases—one being that of public nuisances, and the other being the administration of charitable trusts.

The question is obviously one of great importance. Though, as will be seen hereafter, it has been considered and decided in the courts of other States, it has received the most elaborate examination in the courts of the State of New York, and especially in the case of *Davis and Palmer vs. The Mayor of New York, et al*, (2 Duer, 663) and in the case of the *People vs. Miner*, (2 Lansing, 396.)

The case in 2 Duer, 663, was brought by two tax-payers against the Mayor and others to restrain the construction of a street railroad upon Broadway, for the doing and operating of which the municipal authorities of the city had given authority to the individual defendants under their general power over the streets of the city. The court decided that it was not a public nuisance, but that when any act of a municipal corporation is sought to be restrained or annulled as a violation of its charter, or breach of trust, or an excess of power, the Attorney General was a necessary party, either prosecuting alone or in conjunction with or upon the relation of individual corporators, and required that the Attorney General should be made a party to the proceeding. After examination, Judge Duer arrives at the conclusion that at common law the Attorney General in England could institute proceedings to restrain public and private corporations from exercising powers not granted and from the abuse of those granted; and to sustain his position cites 2 M. and C. 129; 2 M. and C. 613; S. C., 1 Kane, 153, 4 M. and C. 17; S. C., 2 Keene, 190; 1 M. and C. 171; 8 Sim., 193, 373; 9 Sim., 30, 36, 56; 13 Sim., 547; 16 Sim., 228; 2 1 Bligh N. R., 312.

In the subsequent case of the people, at the relation of the Attorney General, vs. Miner, 2 Lansing, 396, which was a suit brought to restrain the commissioners of the town of Augusta from subscribing to the capital stock of a railroad, the Supreme Court of the Fifth district held that the action could not be maintained. Judge Mullen, in delivering the opinion of the court in that case, while conceding that the decision of the court in the case in 2 Duer, 663, was correct, yet denies that the conclusions reached by Judge Duer in his opinion in that case as to the power of the Attorney General in England, are maintainable or warranted by the decisions he quotes. He undertakes to define and classify all the powers possessed by the Attorney General in England, the only two of which, as stated by him, relating to this matter are by writ of *quo warranto* to determine the right of him who claims or usurps any office, franchise or liberty, and to vacate the charter and annul the existence of a corporation for violation of its charter, or omitting to exercise its corporate powers, and by *information to chancery* to enforce trusts and to prevent public nuisances and the abuse of trust powers.

He examines all the case cited by Judge Duer (except the case in Bligh N. Reports), and undertakes to show that they are all cases of an abuse of trust or a misapplication of trust funds, and are maintainable under the general equitable authority of the court over trusts.

But if that be conceded, how does it show that Judge Duer is mistaken? Every misapplication of public funds and every abuse of power by public bodies is in one sense an abuse of a trust. These trusts are certainly not charitable trusts, and it is not contended that the Attorney General has power to institute such proceedings over all trusts, private as well as public. How, then, had the Attorney General a right to interfere here about these so-called trusts? Not certainly because they were trusts, but because they were trusts in which the public were concerned.

The case which Judge Mullen did not examine, not being able to find it, the case of the Attorney General against the

city of Dublin, 1 Bligh N. R., 312, incorrectly quoted by Judge Duer as in 2 Bligh N. R.

It so happens that in that case, which was an appeal to the House of Lords, this question distinctly arose, and the objection was made that it was not maintainable on the ground that it involved no matter of trust. The Lord Chancellor and Lord Redesdale, who both gave opinions in maintaining the jurisdiction, refused to place the jurisdiction on the ground of a trust, but placed it upon the general ground that the State had the right to prevent the doing of illegal acts by public and private corporations. Lord Eldon referred to the case of the Attorney General vs. Browne, (1 Swans, 265) as showing that the jurisdiction was not there placed upon the ground of a trust.

But more recent cases in England have removed any obscurity, if any there be, as to the ground of the jurisdiction maintained there.

In case of the Attorney General vs. the Great Northern Railway Company, (1 Dru. and S. 154), was the case of a bill brought to restrain a railway company from buying and selling coal, and the jurisdiction was there upheld, and the Vice Chancellor placed the decision on the ground that though in that case any share holder might file a bill, yet that in the matter of the abuse of corporate powers, or the exercise of powers not granted the public sustained an injury, and it was competent for the Attorney General, ex-officio, or on relation to file an information to restrain it.

The case of the Attorney General vs. The Mid. Kent Railway Company (3 L. R., Ch., 100), which was an appeal in chancery, an information was brought by the Attorney General to compel the railroad company to make certain slopes of a certain gradient on the line of their road, in conformity with the requirements of its charter, and it was objected that there was no jurisdiction. Both Lord Carnes and Sir John Holt gave opinions sustaining the jurisdiction, placing it upon the broad ground before mentioned.

In the case of Stockport District Water-works vs. Manchester (9 Jur., N. S., 266,) which arose on a contract between the

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city and an aqueduct company to carry water beyond the limits which the city was authorized by law to supply, Lord Westbury said he would not hesitate to act upon the information of the Attorney General.

The jurisdiction has been asserted in the recent case of *Hare vs. London and N. W. Railway Co.*, 2 John, and H., 111; *Liverpool vs. Chorley Water-works Co.*, 2 Degex, Man. & G., 852, at 860; *Ware vs. Regents' Canal Co.*, 3 Degex and Jones, 212, at 228.

In a recent case—*The Attorney General vs. The Commissioners of West Hartlepool*, 10 Law R. Eq., 152 (1870)—which was a case brought by the Attorney General at the relation of certain rate-payers against the commissioners to restrain them from diverting the funds of the town to the procurement of the parliamentary legislation, the jurisdiction was sustained and the relief granted. Here was simply an abuse of corporate powers which was sought to be restrained.

In none of these decisions is there the slightest hesitation in placing the jurisdiction upon the broad ground, that the State had the right in this form of proceeding to restrain all corporations, public and private, from the abuse of powers granted, or from exercising those not granted.

The decision arrived at in 2 Duer, and the principle there maintained, has been approved by the Court of Appeals in the State of New York, in the cases of *Doolittle vs. The Supervisors of Broome County*, 18 New York, 162, and in *Roosevelt vs. Draper*, 23 New York, 324, as also by the Supreme Court of the First district in *Roosevelt vs. Draper*, 16 How. Pr., 100; by the Supreme Court of same district in case of *People vs. Lowber*, 7 Abb. Pr., 158, and in *People vs. Mayor of New York*, 10 Abb. Pr., 144; by the Supreme Court of the third district, in *People vs. Mayor of New York*, (32 Barb., 102,) and the Supreme Court of Pennsylvania, in 50 Pa. St., 100, as also by the Supreme Court of the State of Illinois, in the case of *Board of Supervisors vs. Keady and others*, (34 Ills., 296.)

The question was presented in Massachusetts, in the case of

the Attorney General vs. Salem. (103 Mass., 140,) and it was decided, that, if, in Massachusetts, the jurisdiction existed, no case was made for its exercise; and also that, under the limited equity jurisdiction given in Massachusetts by their statutes, it probably was not conferred upon the Attorney General to institute such a suit.

If the case of *The People vs. Miner*, (2 Lansing, 397) be supposed to decide that the State cannot institute such a suit as the present, then it seems to me that it cannot be sustained. But I do not so understand the decision in that case, though it is difficult to say just how far the court goes in this matter of jurisdiction.

That case was to restrain a town from subscribing to the stock of a railroad company, as being beyond the powers granted in their charter, and the court, while stating, at p. 407, that "it does not mean to be understood as denying the right of the Attorney General to apply to restrain corporations from exercising franchises not granted," decides the case against the right claimed in that particular case, upon the ground that the defendants were expressly authorized to borrow money, issue bonds, and subscribe for stock, and the only question was whether they had properly exercised the powers expressly granted.

But here there is no franchise, privilege, or power, either general or special, granted to this County Court to subscribe for any stock whatever, but if conferred at all, it is a legislative authority to subscribe to the stock of a certain railroad company, and, as is alleged, under certain limitations not complied with.

It was urged on the argument, with great force, that such a power on the part of the State was a very dangerous one; that there was no necessity for its exercise, as the persons whose rights were affected were perfectly competent to protect their rights, and the law afforded them a complete and adequate remedy.

It is conceded that a corrupt officer, in refusing to institute any proceeding when there was a clear violation of law or

constitution, or in putting it in motion when there was no valid ground for its exercise, might use his office oppressively; but this is no more than saying that any person or officer, to whom large powers are confided, may oppress. The remedy lies in seeing that honest and incorruptible men are put into public places, and especially so in those connected with the administration of justice.

But there is another consideration that is entitled certainly to as much weight as that growing out of a possible oppression, and that is the necessity that now exists of providing ample and efficient means for restraining public corporations from misusing powers granted, and usurping powers not granted.

To the argument that in this, and similar cases, the taxpayer has a complete and efficient remedy for the alleged violation of the law and the constitution, it is to be said that it is no argument against the right of the State to prevent public corporations from violating the law, that private individuals have the same right when their private interests are affected. The State has interests apart from and, it may be, antagonistic to those of the individual corporator. It may be to the interest of every individual corporator that the corporation should exercise powers not granted and even prohibited by the constitution, but it is the right and the duty of the State to see that these public corporations do not willfully violate the constitution or the law. If the redress is to be confined wholly to legislation, then it might be wholly ineffectual, especially in those States where the Legislature meets but in every two years.

It is worth while briefly to examine what remedy the taxpayer has in such a case as this, if the subscription be illegal and void, according to the decisions of this court.

It has been decided that certiorari will not lie, (*State vs. Saline county*, 45 Mo., 52); nor prohibition, (*Vitt vs. Owens*, 42 Mo., 512); nor will injunction lie at the suit of a tax-payer, to enjoin the assessment, levy or collection of a tax, however illegal or void. (23 Mo., 443; 20 Mo., 136; 21 Mo., 216; 22 Mo., 90; 46 Mo., 394; 47 Mo., 474; 48 Mo., 175; 48 Mo., 525.)

If a levy has been made for an illegal tax, if the warrant contains any part of the tax which is legal, or the property is liable to taxation in any form, the tax warrant protects the officer, and no recovery can be had. (43 Mo., 479; 47 Mo., 393, 462; 48 Mo., 282.)

The remedy as to illegal taxation seems to be confined to this: That if the tax-payer has real estate, and the collector is not able to make it out of his personal property, he can, when his real estate is about to be sold, enjoin the sale. (24 Mo., 20; 37 Mo., 228); and it seems to be held in the case of *Steines vs. Franklin county, et al.*, 48 Mo., 176, that though the tax-payer has not the right to enjoin the assessment, levy or collection of an illegal tax, he can maintain a bill to declare the contract void, to cancel the bonds, and restrain their payment, sale and transfer.

But in such a case he must give a bond and incur a responsibility, often to the amount of tens of thousands of dollars, while he is only interested to the amount of hundreds, at most.

It is possible, too, for the corporation, conscious that they are about to do an illegal act, to take such steps that the act is done, and the bonds issued are beyond the jurisdiction of the court, so that it is very difficult, if not impossible, for the tax-payer to obtain redress.

I cannot think that there is furnished any effectual protection to the tax-payer from being compelled to pay an illegal tax, or to the State for the violation of the Constitution or the law.

But it is further urged that the Supreme Court of the State has already decided against the jurisdiction here claimed, in the case of the State at the relation of *Connelly et al.*, vs. the County Court of Platte county and the Parkville and Grand River Railroad Company, 32 Mo., 496. This was a proceeding brought in the name of the State, to restrain the county from issuing bonds to the railroad company as not authorized by law, brought, not by the Attorney General or the Circuit Attorney, or at their instance, but by

some citizens of the State, who undertook to use the name of the State without authority in their suit; and beyond question the case was rightly decided. The question arose upon a demurrer to the petition, and one of the grounds for sustaining the demurrer is thus stated: "There is nothing in the petition which shows or pretends to show that the State of Missouri has any interest, legal or equitable, in the subject matter of the controversy, and the suit was improperly brought and cannot be maintained in the name of the State," and this is all that is said on the subject in the opinion. That the State had no pecuniary interest may perhaps be conceded, but the question was not raised or considered whether the State, acting through its legal officers, cannot restrain its public corporations from violating the Constitution and the laws.

It seems to me that, both on principle and authority, this proceeding is maintainable; and that while, in the case of private corporations, the courts in this country will sustain the conclusions arrived at in 2 John. Ch., 371, 4103 Mass., 138, and 104 Mass., 239, that the writ of quo warranto affords an ample and efficient remedy for any violation of its charter, or misuse or abuse of its powers, and therefore that this form of proceeding will not lie, the power of the State, through its proper legal officers, to restrain public corporations from a violation of the law will be sustained.

In the case of the Attorney General vs. Salem, (103 Mass., 138,) the court held that the writ of quo warranto did not lie against a public corporation, and unless we are prepared to admit that the State has no other remedy for the willful and flagrant violation of laws by a public corporation, than by legislation, then the law which appears for the first time in the revision of 1865, and is efficient both for the State and the individual, gives the power to the State to use the remedy by injunction, when it provides, (2 Wag. St., p. 1032) that "the remedy by writ of injunction or prohibition shall exist in all cases where an injury to real or personal property is threatened, and to prevent the doing of any legal wrong whatever, whenever, in the opinion of the court, an adequate remedy cannot be afforded by an action for damages."

Having arrived at the conclusion that this form of remedy is maintainable by the State, we come now to consider whether the State has made such a case as will allow its application here.

By the fourteenth section of the eleventh article of the Constitution, which took effect on the 4th day of July, 1865, it was provided, "that the General Assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election, assent thereto."

This subscription of four hundred thousand dollars by Saline county to the stock of this railroad company was made after the taking effect of the Constitution, and without any assent of the qualified voters being obtained to such subscription. Was the subscription, so made, valid?

This court, in the case of the State ex rel. the Missouri and Mississippi railroad vs. Macon county, 41 Mo., 453, where the charter of the railroad passed before the adoption of the new Constitution, gave power to counties on the line of this route to subscribe without limitation, held that the fourteenth section of the eleventh article of the Constitution, was a limitation on the *future* power of the Legislature, and was not intended to retroact so as to have any controlling application to laws in existence when the Constitution was adopted, and decided that though Macon county made its subscription to the company after the adoption of the Constitution, and without any submission to the qualified voters, the subscription was valid.

A similar provision as to the subscription without limitation, is found in the charter of the Louisiana and Missouri River Railroad Company, passed in 1859, and the first question that is presented is, whether Saline county, situated on the south side of the Missouri river, is, by the terms of the original charter of this railroad company, authorized to subscribe to the stock of that company.

The route of the railroad, as fixed by the 35th section of the

original charter, is in these words, (Session Acts 1858-9): "Said company shall have the power to mark out, locate and construct a railroad from the city of Louisiana, in the county of Pike, by way of Bowling Green, in said county, to some suitable point on the North Missouri railroad, intersecting said road between the southern limits of the town of Wellsburg, in Montgomery county, and the northern limits of the town of Mexico, in Audrian county; thence to the Missouri river at the most eligible point, on a line the most suitable and advantageous," &c.; and by the twenty-ninth section it is provided "that it shall be lawful for the County Court of any county in which any part of the route of said railroad may be, to subscribe to the stock of said company," &c.

It is set up in the answer, and contended here, that the words cited, authorize the railroad company to *cross* the Missouri river and continue its road on the south side of the river till it strikes Kansas City, on the south bank of the Missouri, and some words in the charter in relation to the bridging of navigable streams are seized on to show that, (as is asserted,) as there are no navigable streams on the north side of the river within the State, it was the intention of the Legislature that the company might cross the Missouri river and bridge navigable rivers on the south side.

It is sufficient to say that neither the words used nor the plain intent of the act will admit of any such construction. When a railroad is authorized to be built to a town, it stops there, and certainly no authority is thereby given to construct a road *through* the town to a point some miles away, and then returning to the designated town again. When authority is given to construct a railroad *to* a river, wherever it first strikes the river there it must stop. If Congress had authorized a railroad to be constructed from the west line of the State of Missouri through Topeka to the 100th degree of west longitude, such a construction would not allow that railroad to be constructed across that parallel to Denver, and return to some other point on the 100th parallel.

But if the original charter did not confer power upon Sa-

line county to subscribe, it is contended that such power is found by virtue of what is claimed to be an amendment of this railroad charter, passed in 1868, extending and changing the route of the railroad; that such an extension and change of the route is but an amendment to the original charter, which it was entirely competent for the Legislature to make since the adoption of the new Constitution prohibiting the granting of special charters, as was held by this court in the case of State, at the relation of Circuit Attorney vs. the Cape Girardeau and State Line Railroad, (48 Mo., 468.)

If it be conceded that this act of 24th March, 1868, was a perfectly valid and legal amendment to the original charter of the company, does it produce the result proposed?

The power of the County Court of Saline county to subscribe for the stock of this company, if it exists, must be derived from the power given in the original charter—no substantive grant of power after the new Constitution took effect, being possible.

How, then, stands the case?

The power, given by the charter, of subscription by the County Court is in these words: "It shall be lawful for the County Court of any county in which any part of the route of said railroad may be, to subscribe," &c.

The power, therefore, given to subscribe is not to the counties upon the line of any railroad that may be constructed by the *corporation thereby created*, but to the counties upon "the route of said railroad," as thereby authorized; that is, on the route of the railroad as provided for and designated in the 35th section of the original charter. The Legislature might by amendment afterwards allow an extension of that railroad, or branches to that road, but those counties on the line of the extension or branches could not be on the line of "the route of said railroad," as originally designated.

There is another objection to the power here claimed, (conceding this to be a valid amendment), which is equally fatal. If the power to subscribe, as originally granted, had been a general one and not confined to the route marked out by the

charter, yet, as at the adoption of the Constitution there had been no change of the route, the power of subscription was confined to the counties on the designated route, and they could subscribe without submission to the qualified voters after the taking effect of the new Constitution, because at the taking effect the power already existed. But because, after the adoption of the Constitution, the Legislature can amend the charter by extending the route, does that give a power of subscription on the line of the extension which they did not, at the time of the adoption of the Constitution, have? This is the effect claimed for it, and the result would be the conferring upon counties of a power prohibited after the adoption of the constitution, which they did not possess at its adoption. That this is perfectly clear, seems to me when we consider that under the construction of the original charter, given in this decision, the company at the time of the adoption of the constitution was confined to the north side of the river, and at that time no counties on the south side could subscribe, even if the permission had been given to subscribe to the railroad that might be constructed by the company. So that no right of subscription without submission existed at the adoption of the constitution, in these counties on the south side, and that power must have been acquired by the force and effect of some act passed after the adoption of the constitution, and the constitution prohibits such effect.

But these are not the only fatal objections to the legality of this subscription.

The act of the 24th of March, 1868 (Session Acts of 1868, p. 97), cannot be considered as any amendment to the original charter. With the exception of the title of that act (unless it be claimed that a few words in the last section of the act refer to the original corporation, but which may as well refer to a corporation created by that act), there is not a single word in that act that refers to or mentions, or in any manner connects it with the original charter or the company formed thereunder. The title of the act is this: "An act to amend an act entitled 'an act to incorporate the Louisiana and

Missouri River Railroad Company, by increasing the amount of the capital stock of said company, defining more explicitly the power of the board of directors to fix the western terminus of said road, authorizing the location and construction of a branch road, and conferring upon said Board the necessary powers to carry into effect the several objects contemplated by this charter; and also by striking out sections 11, 18, 27, 30, and 31, of said act." But when we come to look at the act itself, there is not a word that speaks of the repeal of the original act, or any section or part of it, or of that act being a substitution for it or any part of it, or any modification of it; nor is the original act mentioned in it. It commences in its first section as follows:

"Section 1. A company is hereby incorporated called 'The Louisiana and Missouri River Railroad Company,' the capital stock of which shall be ten millions of dollars," and continues through the whole thirty-four sections speaking of the manner of organization, the subscription to the stock, general management and franchises of the corporation created by that act, as if no other corporation by that name had ever existed; stating in the 18th section that "the company hereby incorporated shall commence the construction of the said road within ten years after the passage of this act," and in the 20th section undertaking to allow county courts of any county in which any part of the line of said road may be located to subscribe to its stock, without submission to the qualified voters.

As creating a corporation it is a nullity, the Legislature being prohibited from passing any special charter. As an amendatory act of a corporation existing at the time of the adoption of the Constitution, it must stand on the effect of the title alone. Nothing is better settled than that a title to an act is no part of the act itself. All the office it can perform is to indicate the sense in which the Legislature used certain words or expressions contained in the act which are in themselves ambiguous. Dwaris on Stat. 265, (Potter's Ed.); Sedgwick on Stat. and Cons. Law, 50.

But to say that the title of an act is to repeal another act or

parts of it and substitute that act in the stead of it, when the act itself not only does not manifest any such intention, but there is no word in it upon the subject, is to make it perform an office which no one has ever contended that it is capable of performing.

It follows as a necessary consequence that if that act is void, the Louisiana and Missouri River Railroad Company are not authorized to construct any railroad on the south side of the river, and of course no subscription to it can be valid.

Neither does the 32d section of the 4th article of the constitution, which provides that "no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title, but if any subject embraced in an act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed" in any way change or modify the law as it then stood, that the title is no part of the act. The evil that this section was intended to reach and cure, was the deception that was frequently practiced by means of a false title, or a title not stating the whole truth, both on the public and on the General Assembly; on the public by lulling them to sleep from opposing an unjust or impolitic law; on the General Assembly in the passage of laws by their title in profound ignorance that the law contained anything but what the title gave evidence of. That provision of the Constitution simply says; that if by your title you have not properly pointed out to the public and the General Assembly what the act is about, in so far as you have failed in that particular, your act is void. The provision itself makes a distinction between the *act* and its *title*. The decisions are that a title which fairly expresses the subject of the act is sufficient. The title to the act is no more operative or has any larger effect than before, except that, in order that the act itself should be valid, the title of the act must be exact as expressing its subject matter and must not be misleading. When the Constitution prescribes that the style of the laws of the State shall be: "Be it enacted by the General Assembly of the State of Missouri, as follows," it does not state that what precedes that style is a law or part of a law, but that which follows it.

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But in this particular case, to say that the title to this act of 1868 shall operate to do that which on looking at what follows the enacting clause does not purport to be done—to give it the effect of repealing an act, or part of it, and substituting another act, or part of an act, for it—when the act itself is not only entirely silent on the subject, but the words used are entirely inconsistent with it, as has been before shown, is a result little dreamed of by the convention.

But if the effect be granted to the title it does not help the matter; the result is the same, for if the subject embraced in the "*act is not expressed in the title,*" then as to so much as is not expressed the act is void. That is precisely the case here. Without going into a long comparison of the title and the act it is sufficient to say, as to the amendment of another act, and of the four or five things in which it is said to be amended called for by the title, that there is no mention made in the act itself of any previous act; no mention made of any amendment to it; no mention made of this act being any substitution for that; no mention made of any amendment in the four or five matters mentioned in the title; no repeal of the specified sections; but when we look at the act we find that it is an act granting a charter to certain persons to construct a railroad, with a capital of \$10,000,000, happening to have the same name as that of a company chartered in 1859, but in no way connecting itself with that charter or with that company.

Upon the whole case the judgment is affirmed.

Judge Wagner dissents as to the right of the State to maintain the form of proceeding, and as to holding the act of 1863 void; but concurs in the remainder of the opinion that the original charter only authorized the company to construct the road to the Missouri river, and that the act of 1868 could not invest the County Court of Saline county with power to subscribe the stock without being first authorized so to do by a vote of the people.

Separate opinion by BLISS, Judge.

The Circuit Attorney of the Sixth Judicial Circuit obtained an injunction in the name of the state against the County

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Court of Saline County and other county officers, restraining them from issuing bonds to the Louisiana and Missouri River Railroad Company, in the payment of a subscription of \$400,000 to its capital stock, from assessing and collecting taxes to pay the interest on the same, &c., and mainly upon the ground that the subscription was made without having first submitted the question to a vote of the people, as required by the Constitution. The petition was demurred to, the demurrer was overruled and the injunction was made perpetual.

Before considering the main question it becomes necessary, first, to inquire whether, admitting the illegality of the subscription, an injunction should be granted, and especially in the name of the State.

We have before held (45 Mo., 52) that *certiorari* will not lie to review the administrative action of the County Court; it cannot be reviewed by writ of error, or upon appeal, and unless this proceeding is sustained, each tax payer must be driven to his action against the collector, when an assessment shall be made to satisfy the bonds.

The old chancery rule prohibited injunctions when there was an adequate remedy at law, and this rule is substantially the same under our statute. Thus, a tax collector will not be restrained from the collection of an illegal tax by the sale of personal property, unless he is insolvent, or for some other reason cannot be held as a trespasser. The question usually arises when the property is not subject to taxation, and in such case the collector is held responsible, and, doubtless, if a separate assessment were made upon taxable property, but for the payment of a void obligation, the collector's tax list showing its illegal object, he might be held responsible for seizing property to satisfy the tax, and such is the remark of the court in the State vs. Parkville and G. R. R. Co., 32 Mo., 496, and in Hopkins vs. Lovell, 47 Mo., 102, although the liability was not charged in those cases.

To give jurisdiction, the pleader charges, among other things, that the remedy against the collector would be unavailable, because the County Court has directed the assessment of

taxes to pay the interest to be so combined with other taxes that the tax-payer must pay the illegal tax, or refuse to pay the whole. If this proceeding were in the name of the tax-payer, the suggestion might be considered. But it is not instituted to prevent a private wrong, but is an attempt to throw the shield of the State around the whole community, to ward off a public wrong from which all would suffer, and in the view which I take of the case, it does not matter whether or not each individual tax-payer can recover back the taxes he may be forced to pay for the redemption of these bonds. And yet the claim that each one who is thus compelled to pay may prosecute the collector for enforcing the payment, suggests in one direction, the magnitude of the wrong. Imagine the public grievance, when every owner of property is compelled to pay money to a wrong doer, with the privilege by expending more, perhaps, than the amount thus taken, of recovering it back. The mere pecuniary interest of an individual tax-payer is a private interest, and he must protect himself, but that which affects all tax-payers, as such, is a public matter, and, if it proceed from illegal administration, the public are entitled to protection.

Though a multitude of suits is one of the evils to be prevented, yet this is not the ordinary case where equity interferes to prevent such multiplicity, but it is analagous to a proceeding to restrain a public nuisance, or to prevent the breach of a public trust, and may be classed with the latter although no specific trust fund is being administered.

If there were any doubts upon the question of jurisdiction in other States, where, as we shall see, it has been assumed, there can be none in Missouri. The constitution denominates County Courts inferior tribunals established for the transaction of county business, and provides that the Circuit Court shall exercise superintending control over them, (Art. 6, sections 21 and 23,) and the statute concerning Circuit Courts not only gives them appellate jurisdiction over County Courts, &c., in judicial matters, but also a superintending control over them. (Ch. 136, § 2, G. S.; p. 432, W. S.) This is not an arbitrary

or discretionary control, but must be exercised by modes known to the law. Thus, we have held that *certiorari* will not lie in this case, because the proceedings were not judicial, and for the same reason there cannot be a writ of prohibition or error, and the statute has provided no mode of appeal. Thus all the remedies seem to be cut off but injunction, and if that fails, this superintending control vanishes, and there is no way to prevent any mal-administration however oppressive in its character. Our statute gives the remedy by injunction in very broad terms and says it shall exist "to prevent the doing of any legal wrong whatever, whenever in the opinion of the court an adequate remedy cannot be afforded by an action for damages." (Ch. 167 G. S; p. 1032 W. S.) Even if damages might satisfy a private tax-payer they will not compensate for perverting the revenues and harrassing the tax-payers of a whole community.

How much more adequate the remedy that "prevents the doing of any legal wrong" than those that are merely punitive or that compel every tax-payer to prosecute. The County Court may be punished for refusing to perform a ministerial duty, and yet *mandamus* will also lie. Excess of jurisdiction in judicial proceedings may be corrected by *certiorari* or, perhaps, appeal, or the proceedings may be treated as void, and yet prohibition may be also resorted to. These are cumulative and preventive remedies, and are no more known to the law than injunctions. They are all among the means by which the Circuit Court exercises its control over county courts, and yet there is no statute that so specifically points them out as there is in regard to injunctions. The former are left as provided by the common law, the latter is extended to any legal wrong whatever under the condition named.

This view has, I think, been indicated by this court, though not expressly held, in two important cases. In *Tetherow vs. Grundy County Court*, 9 Mo., 118, a writ of error was denied to the proceedings of the County Court appointing commissioners to locate the seat of justice, but Judge Scott says: "It may be asked, if the County Courts act in a lawless manner in

removing county seats, is there no mode known to the law by which they can be restrained? The Circuit Courts have a superintending control over County Courts, and if they exceed their powers, or act contrary to their duty in proceedings on which writs of error will not lie, there are modes by which they can be restrained in conformity to the usages and principles of law." The reporter in his note clearly mistakes the remedy indicated, for *mandamus* will not lie to prevent a wrong, but only to enforce a duty. In the State vs. Clark County Court, 41 Mo., 44, Judge Holmes, in denying a writ of prohibition in a similar case, quotes approvingly the language of Judge Scott, and remarks that "the court did not attempt to point out what those remedies were, nor is it necessary that we should undertake to indicate them now." But in the cases then and now under consideration, if the writ of injunction is denied, I know of no way in which the restraining power of the court can be exercised, and I am constrained to say, especially under the broad scope given it by the statute, that this is a legitimate and the only adequate remedy.

In whose name, then, should the proceeding be instituted? If the grounds of jurisdiction above indicated are correct, the State certainly has a right to interfere. In the ordinary jurisdiction of chancery in restraining public nuisances, the rule is that if the nuisance affect the public generally, the proceeding should be in the name of the proper representative of the crown, or of the State, or in the name of the State itself, but if individuals suffer a specific injury, they may come into court in their own name for their personal protection. (Spencer vs. L. & B. R. Co., 8 Sim., 193; Attorney General vs. Forbes, 2 M. & C., 123; The B. M. Coal Co. vs. L. C. & N. Co., 50 Pa. St., 91; Sparhawk vs. Union Passenger R. Co., 54 Pa. St., 421; Corning vs. Lowerre, 6 Johns., ch. 439; City of Georgetown vs. Alex. Canal Co., 12 Pet., 91; Bigelow vs. Hartford Bridge Co., 14 Conn., 655.) In England, following the jurisdiction of the Court of Equity over charitable trusts, it has been determined, since the passage of the municipal corporation act, directing the appro-

priation of public property for the benefit of the town, &c., that a trust has attached to it giving the chancellor jurisdiction to prevent its improper disposition. And this proceeding is in the name of the Attorney General, as in superintending and enforcing charities. (Attorney General vs. Aspinwall, 2 M. & C., 613; Same vs. Liverpool, 1 M. & C., 171; Same vs. Dublin, 1 Bligh N. S., 312.)

The same view has been applied in the State of New York to cases similar to the one under consideration. The subject is elaborately considered in Davis, &c., vs. City of New York 2 Duer, 663, and in the Court of Appeals in Doolittle vs. Supervisors of Broome county, 18 N. Y., 155, and 10 Roosevelt vs. Draper and others, 23 N. Y., 318. Doolittle vs. Supervisors, &c., was an application to restrain the county authorities from erecting a new town (township) without legal authority, and an able opinion is given by Denio, Justice, reviewing all the authorities; and he holds that the plaintiff has no such interest in the question as to authorize him to interfere, but, as in *quo warranto*, the restraining of public nuisance, &c., the State should prosecute. In Roosevelt vs. Draper, the opinion was given by the same learned Judge; he affirms the former opinion, and applies the doctrine to the corporate and quasi-corporate action of counties, cities, villages and townships. The liability to taxation was urged as a reason why the plaintiff should be allowed to prosecute, but the court held that an act of administration likely to produce general taxation was a public and not a private concern; that his liability to injury in this way arises from belonging to a community where each man is subject to pay taxes upon all he possesses (p. 233.) This question has often been before the Supreme Judges of New York in their several districts, but I have only referred to the case in Duer. The same view has been taken by a great many other Judges, although in *The People vs. Miner* (2 Lansing, 396), the opposite view is taken. Judge Mullin, of the five districts, delivers the opinion, and claims that in the various opinions where the other view is taken, the remarks of the court are mere *dicta*. This is a singular criticism, under the cir-

circumstances, inasmuch as all his own remarks upon the subject are but *dicta*, for the reason that there is found to be no equity in the bill, because the defendants are not such a corporation as, according to the decisions reviewed, to be subject to an action by the State. The Supreme Court of Illinois, also, in *Supervisors, &c., vs. Keady* (34 Ill., 293), express in their opinion the same view. They sustained, however, an injunction against the county authorities at the suit of a tax-payer, because they had waived the question, although he was not the proper party. See also *Craft vs. Commissioners of Jackson county*, (5 Kansas, 518; 13 Mich. 540.)

A few cases have arisen in Missouri that are appealed to as having settled the question. *Hooper vs. Ely*, 46 Mo., 505, was a suit by a tax-payer, but no question was raised and no opinion was given as to who should have been the proper plaintiff, and the case is no authority upon that question.

In the *State vs. Parkville & G. R. R. Co.*, 32 Mo., 496, the opinion is expressed that the State has no such interest in the case as to warrant a suit in its name. In that case the suit was on the relation of private persons, and if all were allowed to use its name when the injury is a public one, the same evil would arise as when each citizen or tax-payer is allowed to prosecute; hence the State was made a party without authority, and the decisions were substantially correct, though for a wrong reason. The general subject does not seem to have been duly considered, and I feel at liberty to treat the question as still open.

I am aware that the jurisdiction of a court of equity by injunction, even to restrain a public nuisance, has been denied in Massachusetts under their statute (*Hale vs. Cushman*, 6 Met., 425), but it is established in England, and is generally admitted in the United States; and the rule as to the proper party plaintiff is, I believe, universal. I have referred to a few cases where the question is discussed, and I know of none where an individual has been allowed to prosecute unless subjected to a special injury. In the language of Thompson, Justice, in *Sparhawk vs. Union Pacific Railroad Company*, "he must have

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a right to the redress sought, either personally or in a legally-constituted representative capacity. He may not vindicate other people's rights by process in his own name, nor employ civil process to punish wrongs to the public; this is to be done only by public officers in the name of the public."

If the court has jurisdiction at all in restraining county courts from committing a public wrong from which no one citizen receives a special injury, the restraint should be sought in the name of the State. The principle has been established in all the analogous proceedings to which reference has been made. Private persons can represent no one but themselves, and it might be disastrous to public interests, if the County Court could be harrassed with suits by every citizen of the county, whether he has suffered or will suffer special injuries or not.

I have had in this case, more difficulty in regard to question whether injunction will lie at all. Counsel have strongly insisted that there was no warrant in law for the writ, and under the former decisions of this court, which have so often denied this timely and efficient remedy, there was plausibility in their position. But resolving in favor of the jurisdiction, I find no difficulty in concluding both from reason and from analogous cases, that, when the wrong is a public one, suit may be brought in the name of the State, by its proper representative, and under our statute that representative is the Circuit Attorney.

The main question in the case presents to my mind no difficulty whatever. The company had the right to locate and construct their road "from the city of Louisiana, etc., to the Missouri River at the most eligible point," &c. A road from one point to another point or line, necessarily terminates at the latter. To hold that it may cross the line of termination, provided it returns to it again, would render language meaningless and charter provisions a blind. When the road reached the river, that was necessarily its western terminus, and that was as far as the company had a right to go under its original charter. Consequently the county of Saline, lying west and

south of the river, could not be crossed, and could not under the charter become a stockholder.

To enable the company to pursue the route west of the river an amendment to the charter was procured in 1868, and it was under that amendment that the Saline subscription was made. The right to make the amendment is conceded, but the fatal error of the county authorities in subscribing to the stock of the company consists in the fact that the question had not been submitted to a vote of the people, as required by the Constitution which, in the meantime, had gone into effect.

It is claimed that as this is an amendment to a charter which had been granted before the adoption of this Constitutional provision, the right to subscribe continues untrammelled by such provision.

It is settled that when a right to subscribe for stock to a railroad company had been granted to a county before the adoption of the Constitution, that right is not recalled, but continues to exist without regard to its restrictions. (*State vs. Macon County Court*, 41 Mo., 453.) But in the present case, the County Court of Saline county, until the act of 1868, had no right to make any subscriptions of this kind. That amendment granted a power which did not before exist, and the grant is necessarily subjected to all the conditions then imposed by law. It was a new grant, and it does not matter whether it gave a right to build a new branch of an old road, or an extension of the same, or one altogether new. The restriction is upon the legislative power, and the character of the road cuts no figure.

My conclusions are, that injunction is an appropriate and proper remedy, especially under our statute, in a case of this kind; that the State is the proper party, and that the County Court of Saline County had no authority to make the subscription and issue the bonds without having complied with the conditions imposed by the Constitution. I think, therefore, that the judgment of the Circuit Court should be affirmed.

The foregoing opinion was written upon the first hearing, at the last January term. The court being divided in opinion,

a new hearing has been had, and we have been aided by Mr. Shepley, sitting as special judge, as provided by the Constitution, in such cases. Upon reconsidering the case, I am more than satisfied with the conclusions at which I first arrived.

Mr. Shepley has so fully and clearly considered the right of the State to become a party in a case of this kind, that I would add nothing to his remarks, but only desire to say that the right and duty of the State to oversee and restrain public corporations and *quasi* corporations from usurpation or illegal exercise of powers, may not be inconsistent with the rights of a private citizen, as a tax-payer, to sue in a proper case. It may well be, that, where such exercise of power involves as its direct and immediate consequence, a charge upon the real estate of the inhabitants, each owner may receive such personal and private injury as will authorize him as well to ask the interposition of the court. In the cases above cited, where the right of a tax-payer to sue was denied, there was no such injury. The legal action complained of, required no specific assessment of taxes, nor did it create any charge upon private property, and if increased taxation was involved at all, the liability was remote and uncertain.

That question is not concluded by the decision in this case, and should still be considered an open one.

I also desire to say that the character of the act of 1868, which I have called an amendment, as its title purports, was but slightly, if at all, discussed at the hearings, and I have not considered the question whether it was an amendment in fact or a new and void act. I therefore express no opinion upon that subject.

Dissenting opinion of WAGNER, Judge.

Whether the State has the right to maintain this proceeding, at the instance of its law officers, is a question of great importance, and upon which I have grave doubts. It is obvious, I think, that the State, and by that term I mean the State in its corporate capacity and character, has no manner of interest in the litigation. Its rights are in no wise inju-

riously affected, and its interference can only be permitted on the ground that the Attorney General or Circuit Attorney, as the representatives of the State, is legally authorized to interfere, in all cases where private persons are held incompetent to sue, and where the rights of the whole people or any considerable number of them are in danger from the unlawful acts of persons acting, or assuming to act under color of lawful authority or otherwise.

In my judgment it would be unwise as well as mischievous to permit the Attorney for the State to intermeddle with the affairs of private or public corporations, when the stockholders, or others whose interests are affected are entirely competent to protect and take care of them. It would be easy to demonstrate the injustice of the rule, which would take from individuals who are aggrieved by the illegal acts of corporations, or public officers, and confer upon the Attorney General, or other lawful officer of the State, the power to maintain actions for such injuries. The consequences which must necessarily flow from such a power, would be disastrous. The officers of corporations would soon cease to be guided by the wishes or interests of those for whom they act, but would look to the Attorney General, as the one who alone could punish, and who would, when conciliated, be both able and willing to protect them. The rights of the stockholders or the corporations would depend upon the caprice, the good or ill will of the Attorney General, and instead of maintaining their own rights, they would rely on that officer, and the State would be perpetually involved in expensive litigation in which it had no real or essential interest.

There is no authority for exercising this power under the statute, for the law, in defining the duties of Attorney General says that he shall be authorized and empowered, in the name and behalf of the State, to institute and prosecute all suits and other proceedings at law and in equity, requisite or necessary to protect the rights and interests of the State, and to enforce any and all rights, interests or claims of the State against any and all persons, bodies politic or corporate. (1 W. S., 202, § 5).

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Again, it is made the duty of the Circuit Attorney to commence and prosecute all civil and criminal actions in which the State, or any county in his circuit may be concerned; defend all suits brought against the State, or any county in his circuit; prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the State, or any county in his circuit. (*Ibid*, § 12).

The above is the statutory grant of power defining the duties and functions of the Attorney General and Circuit Attorney, and constitutes their exclusive authority under the statute, with the exception of the provision where they are empowered to exhibit an information in the nature of a *quo warranto* against a person for usurping, intruding into, or unlawfully holding or exercising an office or franchise. (2 W. S., 1133, § 1.)

This is the first case in which the power has ever been attempted to be exercised in this State, and that furnishes a strong argument to show that the profession never regarded it as having any existence.

The question was raised in a different form in the case of the State ex rel. Connelly vs. The Parkville and Grand River Railroad Company, (32 Mo., 496), and the right of the State to be made as a party, was emphatically denied. It was there held that the State could not properly be made a party plaintiff, at the relation of a private citizen, to a bill for injunction to restrain a county court of a county from issuing its bonds, or levying a tax to pay for a subscription to the stock of a railroad company; that the State had no interest, legal or equitable, in the subject matter.

An attempt is made to distinguish that case because it was at the relation of a private party, but I cannot see that that makes any difference. The main point is that the State has no interest in the subject matter of the litigation. Moreover, several of the English cases cited as an authority to sustain this proceeding, will be found, on examination, to be cases where the Attorney General proceeded at the relation of private persons, that being one of the ordinary courses in the English courts, but which is denied in this court.

As there is no statutory provision authorizing this proceeding in behalf of, and in the name of the State, it is sought to maintain it by reference to the common law authority of which it is supposed the Attorney General is possessed. If we assume that, in addition to the powers conferred by statute, that officer also has the authority that was accustomed to be exercised in England at common law by the Attorney General, still I do not think it follows that this proceeding is sustainable.

The leading case which decides that the Attorney General or the State is a necessary or rightful party in cases of this character is *Davis, et al., vs. The Mayor, etc.*, (2 Duer., 663), where it was determined, that when the act of a municipal corporation against which relief is sought affects injuriously the whole community over which the corporate jurisdiction extends, the Attorney General is a necessary party to the prosecution of the suit. That was an adjudication made by the Superior Court of the City of New York, and the authorities relied upon are exclusively from the English Chancery courts.

But Judge Mullin, in the Supreme Court of the same State, subsequently examined the question in the case of *The People vs. Miner*, (2 Lansing, 396), and after a most full and elaborate review of all the cases, showed most conclusively that Judge Duer misapprehended and mistook the purport of the authorities, and that the only cases in which at common law, the Attorney General was authorized to interfere to restrain corporate action, or was a necessary party to an action for that purpose, were those in which the act complained of would produce a public nuisance or tend to the breach of a trust for charitable uses. He shows that in the cases where interference was had by the Attorney General, there were trusts delegated to the corporations by act of Parliament, and the intervention of the government was permitted on the ground of threatened breach. I have examined and read all the English cases referred to, and coincide fully with the view taken by Judge Mullin and adopted by the Supreme Court of the State of New York.

The case of the Attorney General vs. The Mayor, etc., of Dublin, in the House of Lords, (1 Bligh, N. R., 312), so much relied upon as being one of the strongest authorities for the maintenance of this suit, was this: An information and bill was filed by the Attorney General on behalf of the inhabitants of Dublin paying water rates, against the corporation, which, stating various acts of mismanagement and misappropriation of the funds arising from the rates, submitting that the corporation were trustees under the act, of rates thereby given, for uses which were *charitable* in their nature; and charging that the conduct of the corporation amounted to a breach of *trust*, prayed among other things a declaration and execution of the *trust*, and that accounts might be taken of the rates received by the corporation, and the application thereof.

To this information and bill, the defendants put in an answer, and among other defenses they submitted that they were not trustees and that the purposes specified in the act were not charitable uses; and the Court held that they had jurisdiction to entertain the information and bill. Here it will be observed that the direct question of trusts and charitable uses was raised, which gave the court jurisdiction.

I have not the time to enter into a review of the English cases, and it would too much extend the length of this opinion, but I think when they are properly looked into they will all be found to be predicated on some act of parliament or have reference to charitable uses or trusts.

The American cases on the subject maintaining the right are unsatisfactory and mostly cases where the point was not raised.

Doolittle, *et al.* vs. Supervisors of Broome county (18 N. Y. 155) was a suit by private individuals to obtain a judgment declaring null and void a certain act of the Board of Supervisors, and it was decided that the suit could not be maintained by persons having no other interest than one common to all the free-holders of the town. That was the real question in the case, and after deciding it, the remark was made that the proceeding of the town, if void, could only be redressed

or prevented at the suit of the State or some officer authorized to act in behalf of the public.

In *Roosevelt vs. Draper* (23 N. Y. 318,) which was also a suit by a private person, the same doctrine was reiterated. But neither of the cases called for any direct decision upon the subject.

So in the case in Pennsylvania, (*The Buck Mountain Coal Company vs. The Lehigh Coal and Navigation Company*, 50 Penn. St., 91), the only question decided was that a bill to enforce the performance of public duties by a corporation was not maintainable at the suit of a private party, in the absence of a special right or authority. What was said about the right of the State or the Attorney General to commence and prosecute the suit was mere *dicta*.

The case of the Board of Supervisors vs. Keady, *et al.*, (34 Ill., 293), was in relation to the constitutionality of an act respecting the removal of a county seat, and the court held it to be unconstitutional. What was said by the judge in reference to the State being a party was wholly outside of the case, and cannot be considered as any authority.

The Massachusetts case (*Attorney General vs. City of Salem*, 103 Mass., 138), was an information in the nature of a *quo warranto* against the City of Salem, in order to redress certain violations of the Statute, and the court held that the grievance was not remediable upon an information in the nature of a *quo warranto*, or upon a bill of equity filed in the name of the Attorney General.

From the best consideration that I have been able to give to the question, I fail to find any good or sufficient reason for permitting the State to become a party to these suits. I am utterly averse to the adoption of any rule that will allow a State officer to intermeddle in the affairs of every corporation in the State. It will lead to abuse and needless expense on the part of the State. It will impose a duty on the law officers with which neither they nor the States have any legitimate concern. It will have the inevitable effect of relieving persons directly interested in corporations from the duty and responsibility of seeing that abuses are corrected by those immediately interested.

I am not prepared to concur in the opinion that the amendatory act was wholly void. That the legislature possessed the power to amend the original act was fully decided by this court in the case of the State *ex. rel.* Circuit Attorney vs. The Cape Girardeau and State Line Railroad Company, (48 Mo., 468). I am aware that the common law rule was that the title to an act constituted no part of the act. But our present constitution has made an essential and important change in this respect. It is now provided that no law enacted by the General Assembly shall relate to more than one subject, and that shall be expressed in the title; but if any subject embraced in an act be not expressed in the title, such act shall be void only as to so much thereof as is not so expressed. (Const. Mo., Art. IV, § 32.)

Under this clause the title performs an important function. The subject matter of the act must be clearly expressed in the title, and if any subject embraced in the act is not expressed in the title it is void. An act without a title would manifestly be a nullity under this provision of the constitution, and therefore, it follows inevitably, that the title forms and constitutes a part of the act.

This constitutional provision has been before this court several times for determination, and the settled construction is that it was the intention of the framers of that section to prevent the conjoining in the same act of incongruous matters, and of subjects having no legitimate connection or relation to each other. It was not designed to embarrass legislation by requiring a needless multiplication of separate bills, but it was intended that everything contained in any single bill should be germane and have a just and necessary connection. (City of St. Louis vs. Tiefel, 42 Mo., 578; State vs. Mathews, 44 Mo., 523; State vs. The Bank, etc., 45 Mo., 528.)

And it has been held that if the title of an original act is sufficient to embrace the provisions contained in an amendatory act it will be good, and it need not be inquired whether the title of the amendatory act would of itself be sufficient. (Brandon vs. The State, 16 Ind., 197.)

Now the title to the act is "an act to amend 'an act to incorporate the Louisiana and Mississippi River Railroad Company, by increasing the amount of the capital stock of said company, defining more explicitly the power of the Board of Directors to fix the western terminus of said road, etc., etc.'"

This is a good title, all relating to the same subject matter, and sufficiently refers to the original act to which it is amendatory. Such being the fact, in my judgment the act should be held a valid law.

Sharp and Broadhead with whom was Thomas J. C. Fagg on motion for rehearing.

1. The question of most importance, so far as the Railroad Company is concerned, is the validity of the act of 1868, as an amendment to the charter of the company passed in 1859. Upon this point the court as constituted by the selection of a special Judge seems to be divided in such manner as to leave it in doubt as to what is really decided. The special Judge holds the act of 1868 to be wholly illegal and void. Judge Wagner dissents, and Judge Bliss expresses no opinion. It is certainly a grave question, both as it affects the county of Saline and the railroad corporation, leaving both in a state of uncertainty in reference to their respective rights and liabilities.

2. The power of the legislature to amend the charter of a Railroad Company, so as to extend the line of its road, and also to construct branches is conceded by all the members of the court. Now as to the powers, rights, privileges and franchises that will be carried by such amendment there is no expression of opinion except by the special Judge, and it is submitted that upon the idea that the original charter prohibited the company from crossing the Missouri River, this is really the controlling point in importance in the whole case. It is believed that the best interests of the State at large as well as the parties directly affected by the proceeding will be directly subserved by the re-argument and re-consideration of this question. It is claimed that the opinion of the special Judge is in conflict with the decision of this court in State *ex rel.*, Circuit Attor-

ney vs. Cape Girardeau and State Line Railroad, 48 Mo., 468.

3. The force and effect of the act of March 24th 1868 as a declaratory statute was not presented to the court at all. The object of that statute was to render certain that which was not certain as to the Western terminus of the road as fixed by the act of 1859. In other words, it was a legislative, interpretation of the act of 1859 which did not conflict with any judicial construction of it nor did it affect any vested rights under it. It was not retrospective but operated entirely *in futuro*, and therefore it was competent for the legislature to pass it and thereby fix the route of the road so as to authorize any county on the same side of the river to subscribe to the capital stock.

VORIS, Judge, delivered the opinion of the court on motion for rehearing.

The motion in this case together with the proceedings in the cause have been fully considered.

The motion seems to be mainly predicated upon the disagreement of the Judges of the court who heard the cause upon the validity of the act of 1868, as an amendment to the charter of the Louisiana and Missouri River Railroad Company passed in 1859. In my view of this case, it is not material to the settlement of the main question involved therein, whether said act be valid or not, and this, I think, was the opinion of the Judges who heard the cause; the judgment of the court would be just the same let this question be decided one way or the other. Therefore I think, that it would be unjust to compel the respondents in this case to re-argue the cause in order to settle a question which cannot affect the general result. It may be true that it is important that this question should be settled, and if we were sitting in this case to hear it upon the original trial in this court, we might deem it our duty to pass upon the question suggested; but in my opinion, it would be unjust to the opposite party under such circumstances to compel it to re-hear and re-argue the cause. Judges Adams and Wagner absent.

The other Judges concurring the motion for a rehearing is overruled.

The State v. Callaway County Court.

STATE OF MISSOURI, *ex rel* CIRCUIT ATTORNEY FOR SECOND JUDICIAL CIRCUIT, Appellant, *vs.* CALLAWAY COUNTY COURT, Respondent.

1. *Railroads—Louisiana and Missouri River Railroad—Charter—Act of 1868 amending charter invalid.*—The act of 1868 which professed to amend the charter of the Louisiana and Missouri River Railroad was illegal and void, and did not constitute a new charter of said Road. (State vs. Saline County, ante p.350 affirmed).

2. *Injunction—Subscription—Railroads—Negotiator of bonds—County courts—Parties.*—In an action by injunction when the petition alleges that a County Court had made an unlawful subscription to a Railroad, and had delivered a quantity of bonds issued to pay such subscription into the hands of an agent to be negotiated, and had levied a tax to pay said bonds and the interest thereon; and the petition prayed that the subscription be cancelled, and that the County Court and the Justices thereof and said agent be restrained from commission of said acts: *Held*, that the Railroad and the agent for the negotiation of the bonds as well as the County Court and its Justices were proper parties to the action.

Appeal from Callaway Circuit Court.

Overall, Circuit Attorney and Adams & Guilar, and Edwards & Dunckan, for Appellants.

I. The South Branch of the Louisiana and Missouri River Railroad was a new enterprise not authorized by the original act or charter, and the only authority for the new enterprise is the amendatory act of 1868. The subscription forming the basis of the bonds in question was wholly unauthorized, no assent having been given to the same by the qualified voters of the county. The legislature could not confer on the County Court the power to make such subscription unless "two thirds of the qualified voters of the county at a regular or special election assented thereto" (Art. XI, § 14, Const. of Mo.) The subscriptions and bonds are therefore absolutely void and the County Court has no authority to harass the tax-payers and confiscate their property by illegal levies for the payment of these bonds.

II. The Circuit Courts by the Constitution and also by the Statute Laws of this State have a superintending control over County Courts whether acting in an administrative or judicial capacity. This is a proceeding invoking the proper exercise of this superintending control and ought to have been

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sustained by the Circuit Court. (Art. VI, §§ 21, 23, Const. of Mo. Chapter 141, Gen. Stat. 1865 pages, 550-551, § 2; Tetherow vs Grundy County Court, 9 Mo., 120; State *ex rel* West and others vs. Clark County, 41 Mo., 50, 51; Vitt vs. Owens, 42 Mo., 512; Hooper vs. Ely, 46 Mo., 505.)

III. A proceeding in the name of the State, brought by the Circuit Attorney, is the only proper way in which the Circuit Court, in a case like this, can exercise its superintending control over the County Court. The county itself is paralyzed by the very tribunal created to attend to its business and can not *sue its own court*. And the county being an integral part of the State for governmental purposes, whatever injures the county injures also the State. And as the county cannot sue its own court, the only proper remedy in such case must be in the name of the State. (See authorities cited on the 2nd point; Doolittle vs. The Supervisors of Broome County, 18 New York, 155; Roosevelt vs. Draper, 23 New York, 318; Davis vs. The Mayor of New York, 2 Duer, 663; The Board of Supervisors of Iroquois County, *et al.*, vs. Keady *et al.*, 34 Ill., 296-297; Sto. Eq. Pl., § 49; Mitf. Eq. Pl. by Jeremy, 4, 21, 24; Cooper Eq. Pl., 21, 22, 191, 102, 202; Atty. Genl. vs Vernon, 1 Vern., 277, 282, S. C., 370; Edwards on Parties in Eq., 60, 61; Calvert on Parties, ch. 3, §§ 21, 301, 308; 2 M. & C., 129; 1 Keen, 153; 2 M. & C., 613; 2 Keen, 190; 9 Sim., 30; 1 M. & C., 171; 16 Sim., 228; 13 Sim., 547; 1 Bligh, N. S., 313; 8 Sim., 193, 373.)

IV. The defendants were all proper parties to this proceeding. They were all interested, so that complete justice could not be done in the premises without bringing them before the court. But if any of the defendants were improperly made parties, they should have demurred alone, and not jointly with the others. See Ashley vs. Winston, 26 Mo., 210.

V. The subscription made by the County Court of Callaway county to the South branch of the Louisiana and Missouri River Railroad is wholly unauthorized by the original charter, and in derogation of the Constitution of this State.

1. Under the original charter, approved March 10th, 1859, the

company was authorized to build but one *main trunk line*. (Sess. Acts 1858-9, 400, § 35.)

2. Under the original charter the County Court of Callaway county were authorized to subscribe to "*one main trunk road*," created by said charter.

3. The subscription in question is made to the capital stock of the "South Branch of the Louisiana and Missouri River Railroad," see order of County court.

4. The "South Branch of the Louisiana and Missouri River Railroad" had no existence under the original charter, but was created and authorized by the amended charter of said company, approved March 24, 1868. (Sess. Acts 1868, 97 § 22.)

5. The subscription in question was made to "the South Branch of the Louisiana and Missouri River Railroad" after the 4th of July 1865, the date on which the present constitution of this State went into effect. Said subscription was made by the County Court of Callaway county, without having first submitted the question of making the same to the qualified voters of said county, at a regular or special election held therein, and without having obtained the assent of two-thirds of said qualified voters thereto, either prior or subsequent to the making thereof. Such subscription is illegal and invalid if made without such submission and assent. (Art. XI. § 14, Const. of Missouri; *The St. Joseph and Denver City R. R. Co. vs. Buchanan County Court*, 39 Mo., 485; *State ex rel. Mo. & Miss. R. R. vs. The Macon County Ct.* 41 Mo. 453.

The points and authorities relied upon by *R. A. Campbell* and *Sharp & Broadhead*, for Defendant in Error, are substantially the same as those urged by Sharp & Broadhead in the case of the State vs. Saline county, ante p. 350, and are therefore omitted.

Ewing & Smith and Hayden, Kouns & Hockaday, for Defendants in Error.

I. There is a defect of parties plaintiff.

That the State is improperly made a party, and that the suit is improperly brought in the name of the State, is clear from the simple fact that the State has no interest, legal or equitable, in the subject matter of the action. (State vs. Parkville and Grand River Railroad Company, 32 Mo., 499.)

This principle applies as much to the case in which the Circuit Attorney proceeds in the name of the State, as if the suit were brought at the relation of a private citizen.

The Circuit Attorneyship is an office created by statute. The officer is the creature of the statute so far as his official powers and duties are concerned.—Every power and duty incumbent upon him is enumerated in and conferred by the statute, and without the statute he can do nothing. There is no statute which confers upon him the right or duty to make the State a party to this proceeding; and the mere fact that such officer commenced suit in the name of the State, does not confer on the State any interest in the subject of the action which the State had not antecedently. The right of the State does not depend upon *his* action; but his right to act depends upon the interest which the State has. If the State has not (without any action of the Circuit Attorney) such an interest in the controversy as to devolve this duty upon him, the case gains nothing by the fact that the Circuit Attorney commits the State to it as a party plaintiff. (Gen. Stat., 1865, sec. 10, page 142; *M.*, sec. 1, page 632.)

II. There is a defect of parties defendant.

(*a.*) In this case the acts which are sought to be enjoined or prohibited are the issuing of certain bonds, the sale of them, and the levy of a tax to pay them with. It is not anywhere alleged in the petition that the L. & M. R. R. Co. has done, is doing, or has threatened to do, or to aid in doing, either of these acts; or that said defendant ever advised, instigated, approved of, or procured the doing of either of said acts; or that she is a necessary party to the complete determination of the action, or that she ought to be, or can be, included in any decree that could be made upon the allegations of the petition in this case. Therefore, the L. & M. R. R. Co. is improperly made a party defendant.

(b.) Thomas L. Price is improperly made a party defendant.

It is not alleged in this petition that said defendant has done, is doing, or is about to do, any of the acts complained of in said petition. It is not alleged that he has any interest whatever in the subscription, bonds or tax, or that he at any time advised, instigated, approved of, or procured the doing of any act complained of.

(c.) George Bartley, G. E. O. Hockaday and William F. Dunn are improperly made parties.

The petition shows very clearly that the acts complained of were done by these gentlemen as the county court of Callaway county. As mere individuals there is really not a single allegation in the petition which affects them. Their acts as a court are sought to be enjoined or prohibited, and as simply administrative or ministerial, and for this very reason no injunction or prohibition could be issued by the court in the premises. (*Vitt vs. Owens, et al.*, 42 Mo., 512; *State ex rel. West vs. County court of Clark county*, 41 Mo., 44.)

III. But the petition does not state facts sufficient to constitute a cause of action, as is shown by two leading considerations. (1.) In the language of our Supreme Court in "*State vs. Parkville and Grand River Railroad Co.*, 32 Mo., 496: If the county court should do all that the bill charges it has threatened to do—issue the bonds and levy and collect the tax—it does not appear that the injury to the tax-payers would be irreparable, or such as could not be redressed by an action at law; and unless it thus appears, it is not a case for equitable relief."

(2.) But if the allegations of the petition are true, those allegations do not charge the defendants with doing, or with intending to do, any act which they have not the legal right to perform.

Under the act of incorporation of March 1868, there is no doubt that the only proper defendant in this case (to-wit, the County court,) had the legal right to do all the acts complained of. It has already been decided (*State ex rel. Mo. & Miss. R. R. Co. vs. Macon County court*, 41 Mo., 453) that this legal

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right of the County court under their charter was not annulled or impaired by Art. XI, § 14 of the Constitution. It is also decided that this said legal right is not affected or impaired by section 30 of the general act of 1861, nor by General Statutes, chap. 63, sec. 7, p. 338, and the reasoning in this case, and the case of "City and County of St. Louis vs. Alexander," (23 Mo. p. 507) conclusively shows that the rights of the defendants under their charter is not affected or impaired by section 30 of the General Railroad Law of 1855. (R. S., 1855. chap. 30, sec. 30, p. 427.)

If, therefore, said right has been in any way impaired or affected, it must have been by the act of March 28, 1868, (Sess. acts, 1868, page 97.) But this act of amendment does not so affect their rights.

The petition itself shows that no subscription was ever made by the county court of Callaway county under said amended charter.

It was perfectly competent for the Legislature to authorize by statute, after the adoption of the constitution, that a legal and existing subscription should be applied, in a particular way, to the purposes for which it had been made, and to enable the railroad company to protect the county which had subscribed the funds, and this is all that the amended charter does, so far as the subscription of Callaway county is concerned.

There is no question about the right of the County court to make the subscription under the original charter. It is a principle which pervades our whole system of law, that statutes can not be repealed by implication, and that statutes on the same subject shall be so construed as that they shall stand together when it is possible that they can do so; as in the cases already cited of "City and County of St. Louis vs. Alexander," and "Missouri and Mississippi Railroad Co. vs. Macon County Court." This principle, in its application to the present question, shows conclusively that the amended charter does not affect the right of the County court to make the subscription even if it had been made after the passage of the same.

The charter of the company has never been amended as to

the very point in issue in this case. The right of the County court to make subscriptions to the capital stock of the road is *not legislated upon* at all in the amended charter. That right is not derived from, affected by, nor dependant upon the amended charter. The only legislation that refers to the question at all, is the 22d section, which simply directs that the subscriptions made to the capital stock, under the original charter, shall be used in a particular way, and does not pretend to give any new power to the County Court, or any power at all, to make such subscription. Moreover the principle of construction applied to the General Statutes is applicable here, and the amended charter, as to this subject, is a continuation of the original charter and not a new enactment. (Gen. Stat., 1865, page 883, §§ 5, 6.)

The error, (as to the right of the County Court to make the subscription,) into which the plaintiff in error seems to have fallen is, that the subscription under the amended charter was to the *South Branch* of the L. & M. R. R. Co., when really (admitting that the subscription of five hundred thousand dollars was made under the amended charter,) it was made to the Louisiana and Missouri River Railroad *Company* and not to the South Branch. The amended charter only changed the name of the road—it called it a branch instead of a trunk road—but the road itself is to run over precisely the same ground under the amended charter that it did under the original charter. *It is precisely the same enterprise*, conducted by the same Board of Directors, running over the same ground, and having the same objects in view under one charter that it has under the other. So at last it is difficult to perceive that the amended charter has made any material change in the enterprise, or that its effects and objects are any thing more than to aid and facilitate the success of that enterprise as inaugurated under the original charter.

IV. The petition does not state facts sufficient to constitute a cause of action in this, that if the whole action of the County Court is as illegal, unconstitutional and void as the petition alleged it to be, the wrong cannot be remedied in this case.

(State vs. Parkville and Grand River Railroad Company, 32 Mo., 496; City and county of St. Louis vs. Alexander, 23 Mo., 483; Sayre vs. Tompkins, 23 Mo., 443; Vitt vs. Owens, 42 Mo., 472; West vs. Clark County court, 41 Mo., 44; Deering vs. N. Y. & Cumberland R. R., 1 Am. Rail. Cas. 152, and cases there cited.)

V. The State has no right to have or maintain this action, because the State is the sovereign, and she authorized all the acts complained of in the petition. The Legislature has all the power of the State. Even if the Legislature be only the agent of the State, still the State cannot maintain the action, for the charters of the company are acts of the General Assembly, and the State cannot repudiate the acts of her agent. (People vs. Renselaer & Saratoga Railroad Company, 2 Am. Rail. Cas. 447.)

With these views we submit the case, feeling confident that this court will affirm the judgment of the court below.

SHEPLEY, Special Judge, delivered the opinion of the court.

This was a proceeding in the nature of an injunction brought by the State, through the circuit attorney of the Second judicial district, against the County Court of Callaway county and the justices thereof, the Louisiana and Missouri Railroad Company and Thomas L. Price, to restrain the issuing and negotiation of certain bonds of Callaway county, issued and to be issued in payment of a subscription to the capital stock of the railway company made by the county, which subscription is alleged to be illegal and void.

The petition, after alleging the incorporation of the railroad company in 1859, and stating the line of the railroad, as authorized to be constructed by that charter, goes on to state the passage by the Legislature of the act of the 24th of March, 1868, alleged to be an act amendatory of the charter (the force and effect of which we have considered in the case of the State vs. Saline county, decided at the present term); that the amendment was duly accepted by the railroad company, "and became, and is to all intents, the charter of said company;" that by the amendatory act the railroad company is invested

with the power to locate and construct a branch road, to be known as the South Branch, which was a new and independent enterprise, and that by that act subscriptions to the branch and main lines were to be kept separate, and that subscriptions to one cannot be used for the other; that the main line, as located, does not touch Callaway county, but the south branch runs through it. That in August, 1868, the County Court of Callaway county, without submitting the matter to the qualified voters of the county, made a subscription of \$500,000 to the "South Branch of the Louisiana and Missouri River Railroad," which was entered on the subscription book of the branch road. That the subscription so made was void. That in 1868 and 1869, the County Court ordered to be executed, and did execute and place in the hands of defendant, Price, for negotiation, \$200,000 of the bonds, which were then in his hands, and he received them knowing that they were void. That in 1869 the County Court levied a tax in the payment of these alleged illeged bonds and the interest thereon, and that such taxes were then in the hands of the Collector of the county for collection. That the County Court will, if suffered to go on, by this unlawful taxation, appropriate to the use of the railroad company in payment of said illegal bonds the greater part of the taxable property of the county, and that the State will be greatly hindered and prevented from collecting its revenues; that irreparable loss and damage will be inflicted upon the tax-payers of the county and State; and prays that the Circuit Court, in the exercise of its superintending control over the County Court, restrain that court and its Justices in their illegal acts; that the bonds issued be delivered up and cancelled; that the orders of the County Court imposing a tax be annulled, and the subscription to the South Branch be cancelled, and for other relief. Copies of the several orders of the County Court are made exhibits to and filed with the petition.

To the petition the defendants demurred, upon the ground that the suit was improperly brought in the name of the State; that Price and the Justices of the County Court were not nec-

essary or proper parties; that the County Court had a perfect right to do what they did; that the action of the County Court was ministerial, and the Circuit Court had no jurisdiction of the case either by prohibition or injunction; that if illegal neither the State nor any tax-payer could be injured; that by the showing of the petition the injuries, if any, are not irreparable, and there is an adequate remedy at law; that the allegation that by these acts the revenue of the State is endangered, is absurd on its face and impossible.

Upon the hearing the demurrer was sustained, and judgment was given for the defendants.

As will be seen, the subscription alleged to be invalid is made to the stock of the same railroad company, the charter of which and the alleged amendment thereto came up and was examined by the court in the case of the State of Missouri *ex rel* Circuit Attorney against Saline county and others, decided at the present term. Saline county is on the south side of the Missouri river, and the route of the railroad could not possibly pass through that county, as fixed by the original charter. Callaway county is on the north side of the river, and may fairly be assumed to be one of the counties through which the route of the railroad, as designated in the charter of 1859, might run.

The change of the route which was supposed to be affected by the amended act, was where in the twenty-first section of that act it gave said company the power to construct a road from Louisiana through or near Bowling Green to such point on the north or south bank of the Missouri river as the directors might select, and by the twenty-second section to construct such branch, to be called the South Branch, from the main line at a point not further east than Bowling Green to any point on the Missouri river between St. Aubert, in Osage county, and the city of Boonville, in Cooper county.

It is stated in the petition that the main line, as fixed by the act of 1868 does not run through Callaway county, but that what is called the South Branch as fixed does, and that the subscription complained of was made to the South Branch.

Upon reference to the decision in the case of the State vs. Saline county, before referred to, it will be seen that it was there decided that the alleged amendatory act of 1868 was illegal and void, and, therefore, that the petition, in undertaking to state that that act is and was the charter of the company, is entirely in error.

The petition (the truth of which, as the judgment was on the demurrer, must be assumed) distinctly states that the subscription was to the South branch of the Missouri and Mississippi Railroad, and was made in August 1868.

Apparently there is a violation of law in making the subscription. It is illegal as being made upon a branch road constructed and marked under the provisions of an act which we hold to be void, and we are not allowed in deciding this case to look into what are filed as exhibits with the petition, but are confined to the case as presented in the petition itself. As the case now stands, having in the case of the State vs. Saline County affirmed the jurisdiction it will have to be reversed; and as we have decided to remand it, it may be proper to say that if the exhibits show the true facts of the case, the county of Callaway had in January, 1867, and before this supposed amendatory act was passed, ordered a subscription to be made to the stock of the company, and by their proceedings of June 11th, 1868, it would appear that the subscription was made to the corporation, and for the construction of the line as it originally stood, but on that day the County Court, approving the acceptance of the amendment by the company, ordered that the commissioners "transfer the stock taken by said commissioners" in the "capital stock of the company to the branch books of said company."

If there had been no change in the subscription, and no attempted amendment, and the company had constructed their line to the Missouri river substantially as they have done, it may be that the subscription would have been perfectly legal. The facts are not before us so as to form any opinion upon the question or upon the effect of the subsequent action of the County Court or the railroad.

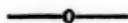
 McVey, Curator, v. McVey, et al.

It is objected that the railroad company and Price are not proper parties to the proceedings.

The petition asks that the subscription to the stock books be cancelled, and the bonds be surrendered and cancelled. The subscription cannot be cancelled, as the stock books are in the hands of the company, except by making the railroad company a party to the proceeding.

It might be that the practical results would be the same if in a suit against the county alone this transaction was declared to be illegal, but as the prayer is that the subscription may be cancelled, we cannot say that the railroad company is an unnecessary party. Nor can Price be considered an unnecessary party, as it is averred that the bonds alleged to be illegal are placed by the County Court in his hands for negotiation as the agent of the county.

The case is reversed and remanded. Judge Wagner dissenting on the question of jurisdiction, and not concurring in holding that the act of 1868 is void. Judge Bliss concurs in the result.



ABSOLEM McVEY, Curator, &c., Appellant, vs. McVEY, PHILIPS and VEST, et al., Respondents.

1. *Administrator—Appraisement—Affidavit—Signatures—Construction of statute.*—An affidavit made and signed by three appraisers appointed to appraise land about to be sold by an administrator, (see W. S., 97, § 29,) with the appraisement immediately following and attached thereto, commencing "we appraise as follows" etc., is a sufficient compliance with that section although the signatures were not also appended to the appraisement.
2. *Guardians and Curators—Minors, lands of—Sale of—Probate Court.*—Probate or County Courts have power to order guardians or curators to sell the lands of minors at private sale. That power is not taken away by the statute of 1855, touching curators and guardians. (R. C., 1855, p. 826-7, §§ 25, 26, 27). The object of this statute was not to take away from those courts any existing powers in ordering the sale, but merely to regulate the proceedings of the curator or guardian in conducting the sale.
3. *Construction of statute—Repeals by implication, etc.*—The settled rule of construction is, that if by any fair interpretation, all the sections of the law bearing on a given topic can stand together, then there is no repeal by implication.

4. *Construction of statute—General affirmative statute does not abrogate particular one, except etc.*—A later statute which is general and affirmative, does not abrogate a former one which is particular, unless negative words are used, or unless the two acts are irreconcilably inconsistent or repugnant.
5. *Curator—Sale of ward's estate—Appeal from county to Circuit Court—Will lie, when.*—In case of a judgment of the County Court approving a sale by a curator of his ward's estate, the statute contains no prohibition of the right of appeal, nor is there any provision regulating it. *Held*, that in such cases, an appeal will lie from the County to the Circuit Court; but that the only effect of the appeal will be to take the record of the County Court up to the Appellate Court in the same manner and to the same extent as in cases of *Certiorari*. (*Snoddy vs. Pettis County*, 45 Mo., 36, and *Kenrick vs. Cole*, 46 Mo., 85 commented on.)
6. *Circuit Court—Judgment of, disapproving sale by guardian—Appeal from to Supreme Court will lie.*—On appeal to the Circuit Court from the judgment of the County Court approving of the sale of a ward's estate by his curator, a judgment of the Circuit Court disapproving the sale, will authorize an appeal therefrom to the Supreme Court. Though the Circuit Court judgment is not a complete and final disposition of the cause, yet it is final so far as that court is concerned and that is sufficient.
7. *Guardian—Sale of Ward's land—Report concerning—Approval of, by Circuit Court—May be made how long after sale.*—Where a guardian sold the land of his ward in March 1856, and filed his report with the County Court at the April term of that year, the mere fact that the report remained in abeyance and undetermined for several years, would not render its approval at the end of that time, if otherwise regular, unauthorized and invalid. Until there is a final judgment and order approving the sale, the functions of the curator are not final; and the purchaser can get no deed and acquire no title.

Appeal from Moniteau Circuit Court.

Napton, for Appellant.

1. No appeal lies from the judgment of a County Court approving the sale by a Curator of his wards' lands. (See chapter 116 of General statutes, page 465, which contains the whole law on this point.) Section 50, page 473, allows appeals from a final settlement, but no appeal in any other matter. See also section 7, of chapter 137, General Statutes, 556; also section 2, of chapter 136, General Statutes, 550, neither of which gives the right in this case, nor does the administration law. (*Kenrick vs. Cole*, 46 Mo., 85; *Boggs vs. Brooks*, 45 Mo., 232; *State ex. rel., Hixon vs. Lafayette county*, 41 Mo., 39; *St. Louis vs. Tiefel*, 42 Mo., 590.)

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2. The County Court had the power to order the sale at private or public sale. (See Section 22, Guardians and Curators, Rev. Laws Mo. 1845, page 551, under which this sale was made. See also in *pari materia*, Section 8, Guardians and Curators, Revised Laws, 1835, page 295, and Revision of Laws of Mo., 1825; R. C. 1855, 826, § 24; Gen. Stat., 1865, 460, § 28; Robert vs. Casey, 25 Mo., 585.)

3. This power of the County Court to order the sale of a minor's real estate at "private or public sale," was not repealed by the amendatory act of 1851. (R. C. 1855, pp. 827 and 828, §§ 25-29, which are a transcript of the amendatory act of 1851.) There was no express or implied repeal. (St. Louis vs. Independent Insurance Company of Massachusetts, 47 Mo., 149; Deters vs. Renick, 37 Mo., 597; Vastine vs. Probate Court, 38 Mo., 529; State *ex rel.*, &c., vs. Macon County Court, 41 Mo., 453; St. Louis vs. Alexander, 23 Mo., 483. See title, Administration, Revision 1825, pp. 107, 109, 110, §§ 40, 44, 45 and 46; Revision 1835, pp. 52 and 53, Art. 3, §§ 13, 20 and 22; Revision 1845, pp. 86, 87, 88, Art. 3, §§ 25, 29, 32 and 34; Revision 1855, pp. 146-7, Art. 3, §§ 26, 30, 33 and 35.)

4. The objection that the certificate of appraisement is not signed is the merest technical quibble. The statute in this regard is merely directory, the object being to identify the appraisement as the work of the appraisers, and the appraisement being on the same paper with the affidavit signed and sworn to by the appraisers, constituted a certificate which was literally under their hands. In fact, all the requisitions of the statute were substantially complied with, and that was all that was necessary. (See opinion of Wagner, Chief Justice, overruling motion for a re-hearing in Strouse vs. Drennan, 41 Mo., 300.)

5. In this case, the Curatorship was still pending, and the matter of this sale was still pending as a part of the Curatorship, when application was made at the May term, 1869, of the County Court to approve the sale, and the County Court, notwithstanding the lapse of time after the sale, had jurisdiction to act on the report and approve the sale.

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6. The Circuit Court in hearing this case on the record, sit as a Court of Errors, and from its judgment of reversal, an appeal lies to this Court. (See *Strouse vs. Drennan*, 41 Mo., 289, and cases there cited.) Or, if it be assumed that the Circuit Court had no jurisdiction to hear the case, then its action, in overruling the motion to dismiss the appeal from the County Court, was a final judgment, from which a writ of error, or appeal, lies to this Court.

R. Hicks, for Respondent.

The County Court had no jurisdiction to appoint McVey Curator of the estate of said minors which they derived from their mother.

It is said in the case of *Commissioners of Talladida vs. Thompson*, 15 Alabama, 139, that it requires no citation of authorities, to show that the County Court is a court of special and limited jurisdiction, that its record must discover and disclose every fact necessary and essential to the validity of its orders and judgments.

Although the County Court had by law exclusive original jurisdiction of appointing and displacing guardians, orphans, minors, and persons of unsound minds, &c.; yet a general jurisdiction over the subject matter, was not enough. The court could only have had it, in this case, by the existence of those preliminary facts that are specified in the statute. (*Potwines Appeal*, 31 Conn., 383; *Bullymore vs. Cooper*, 46 N. Y., 244; *Small vs. Pennell*, 31 Maine, 270; *Overseers vs. Gullifer*, 49 Maine, 360.)

The power to hear and determine is jurisdiction. (*Fithian vs. Monks*, 43 Mo., 502.) But before this power can be affirmed to exist in this case, the record must show the existence of the facts specified in some one of said sections, 6 or 7. (*Sheldon vs. Newton*, 3 Ohio St., 498; 12 Ohio, 273.)

And it is a fundamental rule that no court can obtain jurisdiction by the mere assertion of it, or by declaring that it has it. (*McMinne vs. Whelan*, 27 Cal., 314.)

And the doings of the County Court in this case were in-

effectual, and a nullity, inasmuch as the court had no authority to commence. (*Small vs. Pennell*, 31 Maine, 270.)

The record and proceedings in this case, do not disclose such a state of facts as authorized the appointment of McVey, as Curator or guardian under the 2nd section of the act. Nor does the record disclose a state of facts, that authorized the court to appoint him "Curator" under the 6th section of the act.

The 7th section of the act provides, "Whenever the County Court shall be satisfied, that it will be for the advantage of minors to appoint a Curator of the estate, different from that of the guardian of the person, it shall be lawful to make such appointment for minors under the age of fourteen years, and to all those over that age, to make such choice."

Now the record and proceedings do not disclose a state of facts, that authorized the court to appoint a Curator different from the guardian of the person, nor did the court make any such appointment. Under this section the court was not authorized to appoint a "Curator" for part of the estate of said minors. It must have been for the whole of the estate of said minors, from whatever source derived.

The order of appointment would seem to indicate, that the court proceeded under the 6th section of the act. But the record fails to show that he was wasting and mismanaging the estate.

And, if the court had so found, there was no warrant in that section to appoint him Curator. Such an appointment would have been in direct violation of the statute. (*Sawyer vs. Knowles*, 33 Maine, 210.)

Before the court can in any case order the sale of real estate of minors for their education, it must have jurisdiction of the persons of the minors and their estate, but at the time the court appointed McVey Curator, it had no jurisdiction over either the persons or estate of said minors. The court could only have obtained jurisdiction over the persons and estates of said minors through a legally constituted guardian, one that had had the legal custody and control of their estate. The court had no authority to appoint, and never did appoint

McVey guardian for said minors. (Maxsom's lessee vs. Sawyer, 12 Ohio, 207; Stewart vs. Morrison, 38 Miss., 417; Graham vs. Haughtalling, 1 Vroom, 552; Hall vs. Lay, 2 Ala., 529; Shanks vs. Seamond, 24 Iowa., 131.)

Nor did McVey under the first section of the act, ever give security as other guardians. The giving of the security in the manner required by the first section of the act, was the only way in which he could obtain the legal custody and control of said real estate, and become the guardian thereof. (McCarty vs. Rountree, 19 Mo., 345.)

Now when the 7th section speaks of appointing a curator different from the guardian of the person, such a guardian was intended as the court has jurisdiction over, and one that has the care, custody and control of both person and estate. (Graham vs. Haughtalling, 1 Vroom, 552; Penfield vs. Savage, 2 Conn., 386; Shanks vs. Seamonds, 24 Iowa, 131.)

And as McVey had not given bond under the first section, there was no guardian of the estate and the appointment as curator void. (Maxsom's lessee vs. Sawyer, 12 Ohio, 208.)

Before an appointment of a curator for the estate of the minors, under the 7th section, it was essential that there should have been a legal guardian of the estate and persons of the minors, and such appointee must have been a different person from the guardian of the persons and estate. (Sawyer vs. Knowles, 33 Maine, 210.)

A father as natural guardian is not appointed, it results to him by operation of law, and a guardian by nature is guardian of the person only and not of the estate. The County Court had no authority to appoint a guardian for a minor during the life-time of the father. (1 Halst. Digest, 507, 807, Opinion of Chancellor Williamson; Hall vs. Lay, 2 Ala., 529; Stewart vs. Morrison's Ex., 28 Miss., 418.)

The very language of the statute itself shows that the natural guardian, unless he had given security as other guardians under the statute, was not guardian of the estate of the minors or such a guardian as the court had any jurisdiction over.

But the petition, record and proceedings, do not disclose

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facts to authorize the court to make the order, without a statement that the father had not the ability to educate the minors the court had no jurisdiction to proceed; and it may be stated as undeniable, that if the father is living and of sufficient ability to educate his children, the child's property cannot be applied for that purpose. (Tyler on Infancy and Coverture, 289, and cases there cited.)

We are not in court in a collateral proceeding attacking the record. We have been brought in to show cause why a report of sale, made thirteen years before the report was offered, shall not be confirmed. We ask the court to place itself in the situation the County Court was, &c.

Phillips & Vest, for Respondent.

I. No appeal lies to this Court from the judgment of the Circuit Court of Moniteau county disapproving the Curator's report of sale.

The judgment of disapproval in case of a sale of real estate by an Administrator or Curator, requires that the Administrator or Curator shall proceed to make another sale, and this is not a final judgment from which an appeal can be taken.

In *Speck vs. Wohlein*, (32 Mo., 124) the court used the following language: "It is plain to be seen, that until a sale of the estate proposed to be sold is approved by the court, it still retains its power and jurisdiction over the subject of the proceedings, and while this is the case, it cannot be said that there has been any final decision. It may be likened to the judgment of a court granting a new trial, which it requires the citing of no authority to prove is not such a final decision as may be appealed from, or to the refusal of a Probate Court to order distribution, which has been held by this court not to be such a final decision as may be appealed from."

This decision is fatal to the case at bar.

II. If this court should entertain jurisdiction of the cause, then we contend that the action of the Circuit Court in overruling the motion of Appellant to dismiss the appeal from the County Court, was proper and constitutes no error. (County

of Boone vs. Corlew, 3 Mo., 12; St. Louis vs. Sparks, 11 Mo., 201; Lewis vs. Nuckolls, 26 Mo., 278; Lacey vs. Williams, 27 Mo., 280; Hall vs. County Court of Audrain, 27 Mo., 329; County of Cooper vs. Geyer, 19 Mo., 257; County of St. Louis vs. Lind, 42 Mo., 348.)

It will be seen from these decisions, extending over a period of thirty years, and under statutes from 1825 to 1865, that the Supreme Court has invariably recognized as correct the practice of reviewing on appeal in the Circuit Courts, the record of the County Court when no mode of appeal was prescribed by statute. A trial *de novo* in the Circuit Court has been ruled to be improper, but the Appellant can be heard upon the record.

III. The Circuit Court committed no error in disapproving the report of sale made by the Curator.

The statute under which the proceedings of the Curator were had, provides for the appraisal of the land, prior to sale, and that at the next term of the County Court after such sale, there shall be a full report of the proceedings, verified by affidavits.

In this case not a single provision of the statute was complied with. There was no appraisal of the land sold, as shown by the record. The Curator filed his petition at the February Term, 1856, of the Pettis County Court, for the sale of his ward's lands, and on the same day the Court made an order of sale. No notice was given the heirs or others, and during the same term of court the Curator filed his report, and on the same day it was approved. Upon this state of facts there can be no question that the sale was illegal. (Strouse vs. Drennan, 41 Mo., 289; Valle vs. Fleming, 19 Mo., 454; Robert vs. Casey, 25 Mo., 584.)

IV. It is claimed by Appellant that this sale can now be approved *thirteen* years after it was made, and after the heirs are all of age, and an expression of Judge Scott, in Speck vs. Wohlein, is seized upon to sustain this position.

In reply, we simply wish to ask our opponent one question, viz:

The statute provides that, "If the court refuse to affirm the report, the order of sale shall thereupon be renewed, and the same proceedings be had as upon the original order." Now in this case, if the County Court had refused to affirm the report, how could the order of sale have been renewed, and who could have made the sale? There is no Curator, for the heirs are all of age. He is *functus officio* by the terms of the statute, yet by the reasoning of the Appellant's counsel, the County Court can renew an order of sale of real estate by a Curator for the education of minors, who are of mature age, and have families of their own about them. This is a species of legal galvanism hitherto unknown in Missouri.

S. Reber, for Respondent.

The practice of bringing up cases from the County to the Circuit Courts, by appeal, seems to have sprung up under the code of 1825—whether it existed prior to that period I have not inquired—and has been either expressly decided, or tacitly assumed, to be a correct practice by the Supreme Court in the following cases:

County of Boone vs. Corlew, 3 Mo., 12; County of St. Louis vs. Sparks, 11 Mo., 201; County of Cooper vs. Geyer, 19 Mo., 257; Wilson vs. Brown's Administrator, 21 Mo., 410; Skinner vs. Platte county, 22 Mo., 437; Walker vs. Likens, 24 Mo., 298; Lewis vs. Nuckolls, 26 Mo., 278; Lacy vs. Williams, 27 Mo., 280; Hall vs. County of Audrain, 27 Mo., 329; Boggs vs. Caldwell county, 28 Mo., 586; Whitehead vs. Stoddard county, 29 Mo., 138; County of St. Louis vs. Lind, 42 Mo., 348; Lind vs. Clemens, 44 Mo., 540; Foster vs. Dunklin, 44 Mo., 216.

In Snoddy vs. Pettis county, 45 Mo., 361, the learned Judge who gave the opinion of the court, makes a *dictum* that a case cannot properly be removed from the County to the Circuit Court by an ordinary appeal, but that it ought to be done by *certiorari*; but he says in deference to the action of the court in Cooper county vs. Geyer, he will treat the record as though regularly brought up, inasmuch as the question was not raised below, and then proceeds to decide the case on its merits.—This case then is not against the former established practice, (though the *dictum* is,) but consistent with it.

In *Kenrick vs. Cole*, 46 Mo., 85, the same learned Judge says, that an appeal from the County Court in the matter of the probate of a will, cannot be taken either under the statutes relating to wills and administrations or under the statute touching the appellate jurisdiction of the Circuit Court, and in support of the latter proposition he cites *Snoddy vs. The County of Pettis*, before referred to, and *Wilson vs. Brown's Administrator*, 21 Mo., 410, and in reference to the last case remarks that Judge Ryland quotes the law relating to the appellate jurisdiction of the Circuit Court but seems not to rely on it. In this, with submission, he misunderstands Judge Ryland, for he held that the appeal in that case was well taken, both under the administration and the general law.

WAGNER, Judge, delivered the opinion of the court.

Absolem McVey being the father, and as such the natural guardian of several infant children under the age of fourteen years, whose mother had died, leaving these infants as her only heirs at law entitled to certain real estate, was by the County Court of Pettis County, in March, 1856, duly appointed curator of the said minors to the end that their real estate might be sold and appropriated to their education. After he was so appointed, he entered into bond as curator with security, and being duly qualified as such, he made application to the court at the same term for the sale of the real estate of the infants for their education. And in pursuance of this application, the County Court made an order to sell the land in his petition mentioned either publicly or privately, first having the land duly appraised by three disinterested householders of the county, and not to sell privately at less than the appraised value. The curator thereupon caused the land to be appraised by three disinterested householders of Pettis County, who delivered to him their certificate of appraisement written out under their affidavit, and referring to their signatures to the affidavit, as the parties making the appraisement.

This certificate is as follows:—

“We, the undersigned, being Householders of Pettis Coun-

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ty, and being called upon by Absolem McVey, guardian and curator of the minor heirs of Hannah C. McVey, deceased, to-wit: William H. H. H., Reuben J., Samuel T., Joseph C. C. T. and Susannah Lucinda McVey, to appraise the real estate the minors inherit from their said mother, Hannah C. McVey deceased, upon our oaths state that we are not of kin to any of said parties, nor interested in this matter in any way, and that we will appraise the said land to the best of our ability,

JESSE T. HEARD,
JOHN R. BROWN,
H. WARREN.

Subscribed and sworn to before me this 4th day of March, 1856.

R. R. SPEDDIN, Clerk of County Court.

We appraise as follows to-wit: The East half of the South-east quarter and the North-east quarter of the South-east quarter of section 33, township 46, range 21; and the East half of lot No. 2 of the North-east quarter of section 4, township 45 and range 21, containing 166 acres and 45-100 acres lying in Pettis County and State of Missouri at the sum of \$1.248.75.

Filed, April 8th, 1856.

R. R. SPEDDIN, Clerk."

After thus having the lands appraised, the curator sold the same to George R. Smith for twenty-one hundred and forty-six one hundredths dollars, at private sale, and made report thereof with the certificate of appraisal attached, to the April term 1856, of the County Court, which report of sale was approved, and the curator ordered to make a deed to a purchaser on the payment of the purchase money. This deed was made in March 1859, and duly presented to the court, and acknowledged. Afterwards, in the Spring of 1869, whilst the curatorship was still pending and undetermined in the County Court, it was suggested that the report of sale of the said land had not been made to the proper term of the court; that the April term 1856 was only an adjourned term of the February and March term, and that the action of the court

approving the sale of that time might be considered nugatory ; and so the curator, at the instance of Smith, the purchaser, again reported said sale referring to the original report and appraisement, and making them a part of his report, and made affidavit to this report as the law requires, and after serving all parties interested with notice, he presented this report to the court at the regular May term 1869, for approval. The court after considering the matter, made a final order and judgment approving the sale and the report. The defendants then asked for an appeal to the Circuit Court, and the County Court made an order granting the appeal and after the cause was docketed in the Circuit Court on motion of the defendants, the cause was taken to Moniteau County on change of venue.

In the Moniteau Circuit Court, the plaintiff filed a motion to dismiss the appeal from the County Court, alleging in substance as grounds of his motion, that the County Court had no jurisdiction to grant an appeal in this kind of a case ; that there was no law authorizing appeals from the judgment of the County Court approving a sale by a curator of his ward's real estate. This motion after being heard, was by the court overruled, and to this opinion of the court, the curator (plaintiff) excepted. The court then, decided that there could be no trial *de novo*, but the case could only be tried upon the record of the County Court, and then proceeding as a court of errors to hear the case alone on the County Court record, reversed the judgment of the County Court, and the plaintiffs excepted and now bring the case here by appeal.

Several propositions have been argued in this court. For the respondents it is contended that there was no valid appraisement because the appraisers names were not appended beneath the certificate ; that the County Court had no authority to order the curator to sell the property at private sale ; that no appeal lies in this case from the Circuit Court to this court, and that the court had no power or jurisdiction to approve the report of the sale last made by the curator. The appellants maintain the converse of these propositions and in addition

thereto, insist that no appeal was allowable from the County Court to the Circuit Court.

The law in reference to the appraisement of a minor's land sold by order of the County Court is governed by the provisions of the statute relating to administrator's sales.

The 28th section provides that before any executor or administrator shall sell any real estate he shall have it appraised by three disinterested householders of the county in which the land lies.

Section 29 declares that such appraisers shall make an affidavit that they will, according to the best of their abilities, view and appraise the estate to them shown, and that they shall view and appraise the same and deliver to the executor or administrator a certificate thereof under their hands. (R. C., 1855, p. 146, §§ 28, 29.)

I do not think that the failure of the appraisers to sign their names underneath the certificate was such a substantial omission as would destroy the validity of the appraisement; for the signing does not constitute the gist or substance of the act. The material point is: Did the appraisers in fact appraise the property, and was this appraisement delivered to the curator? About this there is no controversy. The certificate consists of the affidavit of the appraisers duly signed and sworn to by them, and then the appraisement immediately follows. "We appraise as follows," &c., this refers to the signatures of the affidavit and shows that in making the appraisement they acted under it. The certificate and appraisement so made out were by the curator attached to his report and sworn to by him and were taken and considered as the true appraisement. In letter the statute was not complied with, but in spirit and substance it was, and that is sufficient.

The power of the court to order the Guardian or curator to sell a minor's lands at private sale has always been conceded and acted upon.

In *Robert vs. Casey* (25 Mo., 584), the court expressly decided that the seventh section of the act concerning minors, orphans and guardians, approved February 8th, 1825, conferred

on Probate courts power to authorize Guardians of minors to sell real estate of such minors at private sale to complete their education. In their opinion the court say: "There is in the act no restriction upon the kind of sale which the court may order, whether it shall be public or private." The law as it existed in 1825 has been substantially continued down to the present time. (R. C., 1825, p. 417, § 7; *Id.*, 1835, p. 295, § 8; *Id.*, 1845, p. 551, § 22; *Id.*, 1855, p. 826, § 24.)

But the ground is now taken that if authority was given to sell at private sale, it was repealed by the act of 1851, and that that act required that all guardian's and curator's sales should be made publicly and not privately. The act referred to was imported into the revision of 1855 (R. C., 1855, pp. 826-7, §§ 25, 26, 27). The 25th section of the act provides, that where real estate of minors is ordered to be sold under the provisions of the preceeding section, such sale shall be advertised and conducted in the same manner as now provided by law for advertising and conducting sales of real estate of deceased persons made by executors and administrators for the payment of debts.

The 26th section enacts that no real estate of any minor sold under the provisions of the act shall be sold for less than three fourths of its appraised value, nor shall the Guardian or Curator of any minors directly or indirectly become the purchaser of such real estate. And by the 27th section it is declared that whenever any Guardian or Curator shall sell any real estate belonging to his ward under an order of court, he shall report such sale to the court ordering the sale, in the same manner as executors and administrators are now required by law to report sales of real estate made by them for the payment of debts, and such sale, if approved by said court, shall be valid to all intents and purposes. If the court refuse to approve the report, the order of sale shall thereupon be renewed and the same proceeding shall be had as upon the original order. In the enactment of the above law the intention of the Legislature was to assimilate as near as might be, the sales of curators to those of administrators and executors.

The object was not to take away any existing powers of the County Court in ordering the sale, but merely to regulate the proceedings of the Curator in conducting the sale. As in the Administration law, so in this law if there be a public sale, then it must be advertised, and if a private sale, no advertisement is required or necessary; but the sale, whether private or public, must be conducted as like sales by executors or administrators. There is no express repeal of the prior existing law, and I do not think the language used is sufficient to produce that result by implication. The section conferring the power to order private sales stands in the law precisely and identically as it did before, and the additional sections may be well construed as consistent and in harmony with the original act. The settled rule of construction is that if by any fair interpretation all the sections can stand together, then there is no repeal by implication. A later statute which is general and affirmative, does not abrogate a former one which is particular unless negative words are used, or unless the two acts are irreconcilably inconsistent or repugnant.

The law does not favor repeals by implication. (St. Louis vs. The Independent Ins. Co. of Mass., 47 Mo., 146, and cases cited.)

There is nothing irreconcilable between the general affirmative requirements for advertising and selling publicly, contained in the Act of 1851, and the particular power embodied in the prior statute, authorizing a private sale. The law providing for a private sale may be enforced and carried out, and at the same time be made to harmonize with the subsequent law. Nothing is more common in legislation than to use general language in the enactment of a law, without any intention of impairing or abrogating special or particular laws on the same subject. Hence the natural conclusion is that the right to sell at private sale was not repealed.

Passing to the next question; had the respondents the right to appeal from the judgment of the County Court to the Circuit Court? This depends upon the construction which is to be given to our statute in reference to appeals. It is ad-

mitted that no direct provision is made regulating the subject, but the authority, if sustainable, is deduced from a general power. The statute defining the powers and jurisdiction of the County Court enumerates specifically the same, and concludes with this sweeping clause, "Subject to appeal in all cases, to the Circuit Court, in such manner as may be provided by law." (1 W. S., p. 440, § 7.)

In the chapter on Circuit Courts, it provides that said courts shall have appellate jurisdiction from the judgments and orders of County Courts and Justices of the Peace in all cases not expressly prohibited by law, and shall possess a superintending control over them. (*Id.*, p. 431, § 2.)

In the case now under consideration there is no prohibition of the right of appeal, nor is there any mode pointed out, or provision made regulating the appeal. Such being the case it is denied that an appeal will lie at all. The case of Kenrick vs. Cole, (46 Mo., 85,) is mainly relied on to support this position. That was a case touching the probate of a will, and it was held that the provisions of the statute in regard to appeals above referred to would not sanction or authorize an appeal.

The case was no doubt rightly decided upon the question before the court, for there was another express provision contained in the statute, by which the matter could be determined. (Duty's Estate, 27 Mo., 43.)

But the Judge delivering the opinion went further, and said that the general language in the statute, "subject to appeal in all cases to the Circuit Court in such manner as may be provided by law" had no effect, unless the statute otherwise provided for the mode of appeal.

A similar construction was made by the same Judge, in Snoddy vs. Pettis county, (45 Mo., 361.) It must be conceded that the language used in these cases is in conflict with the prior adjudications of this court, and that for many years the construction placed upon the statute was otherwise. Ever since the case of Boone County vs. Corlew, (3 Mo., 11) decided in 1831 a contrary doctrine has been held. In the county

of *St. Louis vs. Sparks*, (11 Mo., 201,) where it was contended that an appeal taken under the provision quoted brought up the whole case and entitled the party to a trial *de novo* in the Circuit Court, Judge Scott writing the opinion of the court said, "such jurisdiction does not impart a right to try the cause anew, or on any other evidence than that which was before the court below. Otherwise the jurisdiction would not be appellate, but original.

Lewis vs. Nuckolls, (26 Mo., 278,) was a contest about a ferry license. The act gave the County Court jurisdiction over the ferry, but prescribed no mode of taking an appeal from its orders or judgments relating to the same.

From a judgment of the County Court relating to the ferry an appeal was taken to the Circuit Court, and the latter court refused to try the cause anew, but proceeded to give judgment upon the record, and this court, by Napton, Judge, conceded that the appeal would lie, and that the only effect that it had was to take the record up as a *certiorari* would. In *Lacy vs. Williams*, (27 Mo., 280,) the same doctrine is reiterated and enforced. So in *Hall vs. County Court of Andrain county*, (*Id.*, 331,) the right of the party aggrieved to an appeal, although the manner is not provided is emphatically announced.

Upon the authority of the cases, then, it would seem that an appeal lies unless prohibited, but that where no provision is made regulating its mode or manner, its only effect is to take the record of the County Court up to the Appellate Court, just as a *certiorari* would.

In the exercise of its appellate jurisdiction, the Circuit Court, without direct authority conferred by the statute, could not proceed to try the case upon the facts, but must examine it upon the record. (See *County of St. Louis vs. Lind, et al.*, 42 Mo., 348; *Cooper county vs. Geyer*, 19 Mo., 257; *Wilson vs. Brown's Admr.*, 21 Mo., 410; *Boggs vs. Caldwell county*, 28 Mo., 586; *Whitehead vs. Stoddard county*, 29 Mo., 138; *Lind vs. Clemens*, 44 Mo., 540.) That it has been the prevailing opinion that an appeal from the approval of a report

would lie, is, I think, very clear, as all the cases urge as a principal reason against the approval of the report at the term that the sale is made, that the other parties are not in court at that time and cannot protect themselves by appeal.

It is denied that an appeal was allowable from the judgment of the Circuit Court disapproving the sale to this court. *Wolff and Speck vs. Wohlien* (32 Mo., 124,) is relied on as authority. In that case the court did decide that the judgment of disapproval was not a final judgment, and therefore no appeal could be taken. But it seems to me that when we consider that the Circuit Court in this case acted purely in an appellate capacity and ruled on nothing but errors of law that there is some difficulty in maintaining that position. Moreover the decisions of this court not brought to its attention in *Wolff and Speck vs. Wohlien* are opposed to it.

In the case of *Rankin vs. Perry Admr.*, (5 Mo., 501.) Perry as administrator of Ennis presented a claim against Rankin and Honey the representatives of Honey deceased for a demand due to his intestate. On the trial of the cause the County Court gave judgment against Perry. He then took a writ of error from the Circuit Court and in that court the judgment of the County Court was reversed and the cause remanded; an appeal was then taken to this court and an objection was made that it was improperly taken because the judgment was not final, and therefore a motion was made to dismiss. But the objection was overruled, The court speaking through McGirk, Judge, said: "In this case the decision was, that the defendant's decision in the County Court be reversed. This decision destroyed the judgment which the defendants had in their favor, and if this judgment was erroneously reversed by the Circuit Court the judgment reversing it should be reversed; then the effect will be to restore the judgment of the County Court. I am, then, of opinion that the motion should be overruled."

The same point is ruled in the same way in *Perry vs. Alford*. (*Id.*, 503.)

The question was presented in the case of *Strouse vs*

Drennan, (41 Mo., 289) in regard to the adjudications of the late District Court.

The point was, whether an appeal could be taken to this court from a judgment of that court reversing and remanding a Circuit Court judgment, and we held that it could.

Any different ruling, it seems to me, would produce the most disastrous results. Litigation would be interminable and suits protracted indefinitely. Reversals and re-trials would follow and the controversy would never be put at rest in the court of final resort.

Though the Circuit Court judgment is not a complete and final disposition of the cause, yet it is final, so far as that court is concerned, and that is sufficient.

The remaining point is, whether the County Court had any authority to approve the report of the sale, after the length of time that had elapsed. (39 Mo., 514.)

The law says that a report of the sale shall be made at the next term of the court after it takes place. But this is not an absolute and uncontrollable requirement; many circumstances might interpose to prevent a strict and literal compliance, and the sale would not thereby be annulled. The curator by his petition for a sale brings the matter before the court, and it then becomes a pending proceeding in the court, and the jurisdiction continues till there is a final determination. -

Until there is a final judgment and order approving the sale, the functions of the curator are not final and the purchaser can get no deed, nor acquire any title.

A case might be supposed where time would be material, but this does not appear to be one of them. In the case of *Speck vs. Wohlien*, (22 Mo., 310,) where several years had passed without a good and valid approval of the sale, Justice Scott says: "We will not undertake to determine, whether the defect in the approval may not yet be remedied by the Probate Court on notice to all those interested and whether a remedy may not be had otherwise than by a proceeding in the nature of a bill in equity, which we do not think is adapted to obtain the ends sought for by Plaintiff." There was no direct decis-

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ion on the subject. The case did not call for any, but the above extract shows clearly, what the opinion of that able and learned judge was. Now here all the parties were duly notified. They came in and were heard, and I cannot see how they were injured because there was not a strict compliance on account of time.

The property was regularly appraised by the curator, and it sold for largely more than the appraised value, and the purchaser has long since paid the purchase money. That money went into the hands of the curator and constituted a portion of the funds of his wards. The curatorship is still open and unsettled and the curator is competent to act. One party has got the money and the other party is entitled to the lands. The parties have not changed their condition and no other equitable rights have intervened. By carrying out the contract and approving the sale, equal justice is meted out to all. Whereupon in my opinion the judgment of the Circuit Court should be reversed and that of the County Court affirmed.

All the Judges concurring except Adams, who did not sit.

—o—

MONTGOMERY TUTT, et al., Plaintiffs in Error, vs. MICHAEL BOYER, Defendant in Error.

1. *Administration—Sales of lands to pay debts—Validity.*—The sales of lands by administrators will not be viewed with critical eyes by the courts as to matters of form, but their validity will be maintained where the directions of the statute have been substantially complied with.
2. *Administration—Administrators' sales of lands—Approval of by court, a final judgment for purposes of appeal.*—The approval of an administrator's sale of lands, by the court, is a final judgment from which an appeal can be taken, and it cannot be impeached collaterally, and cures defects in form of proceeding.

Error to Henry County Court of Common Pleas.

W. T. Thornton, with Boon and Wright, for Plaintiffs in Error.

- I. The order of the court referred to in the administrator's

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deed did not authorize the administrator to sell the land in controversy, and the sale of land without an order of court expressly conferring upon the administrator the power to sell, is void and passes no title, and the approval of such sale is a nullity. (1 W. S., 97, § 26; 1 Pet., 340; 7 Hill, 345; Thatcher vs. Powell, 6 Wheat., 124.)

The power referred to in the deed did not confer this authority, it only purported to authorize the sale of certain specific lands set out in the order; it reads "so much of the following lands as may be." The word "following" is here used as a word of limitation; it could only have been intended by the use of it to limit the authority to the land therein set out; if this had not been the intention, why use the word at all, or why describe the land, it would have been much easier to have entered a general order for the sale of all of the lands of the decedent, if the courts had so desired; the fact that it did not do so is proof conclusive that it did not intend so to do. But even had it been their intention, it could not have helped the cause, as they neglected to include the land in the order. (Mabie vs. Matteson, 17 Wis., 1; Ludlow vs. Park, 4 Ham., (Ohio) 5; Goforth vs. Longworth, 4 Ham., (Ohio) 129; Jackson vs. Esty, 7 Wend., 148; Bloom vs. Burdick, 1 Hill, 137; McComb vs. Waldron, 7 Hill, 345; Litchfield vs. Cudworth, 15 Pick., 23; Hays, *et al.*, vs. Jackson, 6 Mass., 154-5-6; Norton vs. Norton, 5 Cush., 524; Verry vs. McClellan, 6 Gray, 535; Smith's Probate Law, 146-57.)

This power is to be strictly construed, but even the most liberal construction would fail to benefit the defendant, because in construction, we are compelled to construe the *words used*, and not guess at what were the words intended to be used, and where there is no ambiguity, no outside evidence can be admitted. (2 Pars. Con., 5th Ed., 494, 495; Parkhurst vs. Smith, Willes, 332; 1 Green'l Evid., p. 328, § 277.)

The administrator is an executive officer, he is like a sheriff making a sale under execution, or under a "*Venditioni exponas*," it is simply his duty to obey the writ as he finds it. "He cannot go beyond these commands or question their regularity." (Maupin vs. Emmons, 47 Mo., 308.)

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F. P. Wright, for Plaintiffs in Error.

The administrator's authority to sell the real property of deceased persons for the payment of debts is entirely governed by the statute, and can only be conferred by an order from the Court doing Probate business. (*Haynes vs. Meeks*, 20 Cal., 288.)

The petition which the statute requires to be presented gives the Court jurisdiction of the subject matter, and the notice which the Court then orders to be published gives jurisdiction as to the persons (and this must appear of record) interested in the estate. (*Corwin vs. Merritt*, 3 Barb., 341.)

The order of the Court, and only the order, invests the administrator with the power to sell.

The statute does not leave it to the caprice of the administrator to determine what part of the real estate shall be sold, but clothes the Court with the sole power to determine the matter. The law is well settled that statutes conferring the power to sell, must be strictly complied with or the sale will be void. (*Jarves vs. Russick & Botzold*, 12 Mo., 68; *Valle vs. Fleming*, 19 Mo., 454; *Strouse vs. Drennan*, 41 Mo., 289.)

II. The Court did not order all the real estate to be sold. The lands in controversy are not included in the judgment or order of sale. But there must be an order for the sale of the very land sold or the proceedings will be void. (*Shriver's lessee vs. Lynn*, 2 How., 42.)

Lay & Belch, with *S. E. Price*, for Defendant in Error.

I. By the filing of the petition of the Administrator, for the sale of all the real estate of the decedent, or so much thereof as may be necessary for the payment of debts, even without being accompanied by the accounts and inventories required by law, the court acquired jurisdiction over all the lands of A. M. Tutt, deceased, situated in this State. (W. S., 94, § 10; *Overton vs. Johnson*, 17 Mo., 442,) and was authorized to order the sale of all such real estate, or any part thereof.

II. The statute did not require that the order should describe the lands to be sold either by metes and bounds or numbers. (W. S., 97, § 26.)

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An order to sell the lands of the decedent without giving a description of them would have been sufficient. (*Monk vs. Horne*, 38 Miss., 100.)

III. In construing the order of court, as in the case of any other writing offered in evidence, the object is to get at the intention. It may be read by the light of surrounding circumstances, in order to more perfectly understand its intent and meaning. (1 Greenl. Ev., § 277.) And all contemporaneous writings relating to the same subject matter may be examined. (1 Greenl. Ev., § 283.)

The petition was for a sale of all the land, and it sets out what purports to be a list and description of all the lands to which A. M. Tutt was seized at the time of his death, and then states, that of the above lands the following had been levied on in attachment by Robert Allen, for the payment of a debt amounting to \$2,513 00, and then describes 40 acres of the land in controversy correctly, and gives a description of 320 acres.

It is evident that by following the description of the petition, the court attempted to describe and intended to order a sale of all the lands of the decedent, and that the court intended to order a sale of the lands under attachment, as by law the proceeds of the sale of these lands had to be applied in the first place to the payment of the attaching creditor. (1 W. S., 95, § 12.)

After the sale of the land in controversy the court confirmed the sale, which ought not to have been done, unless there was an order of sale.

IV. The court having by the filing of a petition, acquired jurisdiction over all the real estate of the decedent including the land in controversy, had a right to decide every question respecting it, and its decision, whether correct or not, until reversed or set aside, is binding on all other courts. (*Voorhees vs. Bank of U. S.*, 10 Pet., 449, 478; *Grignou's lessee vs. Astor*, 2 How., 319; 12 Wend., 553; 4 Wend., 440; *Strouse vs. Drennan*, 41 Mo., 289; *Perry vs. Towl*, 48 Mo., 148; *Castleman vs. Relfe*, 50 Mo., 593; *Speck vs. Wohlein*, 22 Mo., 310; *Jackson vs. McGueder*, ante, 55.)

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ADAMS, Judge, delivered the opinion of the court.

The plaintiffs, as heirs at law of A. M. Tutt deceased, brought suit by ejectment against the defendant for certain lands in Henry County.

The defendant claimed the lands by virtue of a sale and deed made by the public administrator of Henry County, who as such was administrator of the estate of said A. M. Tutt, the ancestor of the plaintiffs, and under an order of the County Court of Henry County for the sale of the real estate for payment of debts, sold these lands and the defendant became the purchaser.

Under the instructions of the court, in effect pronouncing the administrator's sale and deed valid, the plaintiffs took a non-suit with leave, &c., and their motion to set it aside being overruled, they excepted and have brought the case here by writ of error. The material point raised and discussed here by the plaintiffs, is that the order of sale did not comprehend the lands in dispute. But when we look at the whole record of the proceedings in the County Court concerning the administrator's sale, we are forced to the conclusion that the lands, if not directly contained in the order, are embraced in it by necessary implication. A. M. Tutt, the ancestor, died largely indebted, and the administrator presented his petition to the County Court for the sale of his lands, and set forth a list of lands as belonging to the estate. These lands were not in that list; but in the same petition an attachment is alleged to exist on the lands in dispute, and they are referred to as being in the foregoing list—so it is evident from the petition that the administrator intended to embrace these very lands and did embrace them by reference to the existing attachment. The order of publication was general for the sale of so much of the land of the deceased as would be sufficient for the payment of the debt. Then the final order of sale refers to the order of publication as having been duly made, and proceeds to make the order of sale, and sets forth a list of lands to be sold which does not include the land in dispute, but evidently the court intended to include them, and by reference to the

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order of publication, &c., these lands must be considered as embraced in the order. This was the construction put upon this order by the court and the administrator. Under this order, the administrator proceeded to have these identical lands appraised for sale, and advertised them as being in the order and sold them as such and the defendant bought them as being comprehended in the order. The administrator at the next term of the court after the sale made his report of sale, setting forth the whole proceedings as required by law, and this sale and report was approved by the court and a deed ordered to be made to the purchaser. There was no objection made by any one at the time the order for sale was made, nor was the report of the administrator of his sale objected to when presented for approval.

So there were two orders made in these proceedings from which the plaintiffs or any person interested might have appealed. But they have quietly rested, and seemingly acquiesced in all these proceedings, and instead of attacking them directly when it could have been done, desire now to call them in question and have them pronounced void in this ejectment. Although there is some conflict in the authorities as to what defects ought to render administrator's sales void in collateral proceedings, the tendency of the decisions of our own court is not to view them with a very critical eye, but to maintain their validity when the directions of the statute have been substantially complied with, (*Overton, et al., vs. Johnson, et al.*, 17 Mo., 442; *Jackson vs. Magruder* decided *ante*, p. 53; *McVey vs. McVey, ante*, p. 406).

In the case under review there has been no substantial defect brought to our notice sufficient to render this sale void in a collateral proceeding.

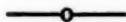
The objection to the appraiser's oath that another person's than Tutt's name was inserted in the affidavit is merely technical, as they were sworn to appraise the lands to be shown to them and did in fact appraise those identical lands.

The same remark may be made in regard to the advertisement, because the public administrator in the same advertise-

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ment, includes the estates of several persons, to be sold. The approval of the sale was a final judgment from which an appeal might have been taken and cannot be impeached collaterally. This judgment has the effect of curing such defects. Upon the whole record, I think the judgment was for the right party.

Judgment affirmed. Judge Vories dissents. The other Judges concur.



MONTGOMERY R. TUTT, *et al*, Plaintiffs in Error, *vs.* MATHIAS
ZENIR, Defendant in Error.

1. Tutt v. Boyer, ante p. 425 affirmed.

Error to Henry County Common Pleas Court.

W. P. Wright, for Plaintiff in Error.

McBeth & Price, for Defendant in Error.

ADAMS, Judge, delivered the opinion of the court.

This case in all essential particulars is the same as Montgomery Tutt and others vs. Boyer decided at this term of the Court, except that this land was expressly included in the order of sale. The part of lot sold in this case was not sold when advertised for sale but on the day it was advertised to be sold the County Court modified the order of sale so as to authorize a private sale—which was made and regularly reported—and the report duly approved. We think the County Court had the power to modify the order of sale so as to authorize a private sale.

The judgment of approval cannot be impeached in this ejectment.

Let the judgment be affirmed. The other judges concur.

Dunbar v. Weightman.

PATTEN and DUNBAR Respondents, vs. JNO. WEIGHTMAN, Appellant.

1. *Officers, liability of—Courts, County—Jurisdiction—Roads, opening of—Obedience to mandate.*—When a county court has jurisdiction of the subject matter of opening roads, its order will generally be a protection to an overseer acting under its command; previous irregularities cannot affect him.
2. *Officers, liability of—Courts, mandate of—Mode of execution.*—The order of a Court of competent jurisdiction, will protect an officer in its legal and proper execution, but not in recklessly and wantonly injuring others.
3. *Proceedings, summary—Rights of third parties—Notice to—Legal implications.*—In summary proceedings, where the rights of third parties are involved, the law always implies that they shall have reasonable notice to prepare for the protection of their rights.

Appeal from the Henry Court of Common Pleas.

Pickerell & Blackford, and McBeth & Price, for Appellant.

I. It was only necessary for the defendant to look to the order of the County Court directing him to open said road. (Butler vs. Barr, *et al.*, 18 Mo., 357; Walker vs. Likens, *et al.*, 24 Mo., 298.)

II. The instructions are inconsistent, and this inconsistency is error. (Wood vs. St. Bt. Fleetwood, 19 Mo., 529; Schmeer vs. Lemp, 17 Mo., 142.)

F. P. Wright, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an action of trespass in which it was alleged that defendant wrongfully and without leave entered upon lands in which plaintiffs were jointly interested, and upon which were growing crops belonging to them, and tore down and took away a portion of the fence enclosing the premises, by which, stock grazing and herding on the unenclosed lands adjoining, entered upon and destroyed the crops growing thereon, to the plaintiffs damage, &c.

Defendant justified on the ground that he was acting as road overseer, and averred that he entered and tore away the fence in obedience to an order of the County Court, which directed him to open the road running through the plaintiff's premises and remove obstructions which might be found in the same.

There was a trial before a jury, and verdict for plaintiffs. The evidence contained in the bill of exceptions shows that the road ran diagonally across the plaintiff's field, that in the field were about thirty acres of corn, several acres of oats cut and shocked, and one acre of potatoes besides garden vegetables. That plaintiffs were away from home at the time the fence was removed, that no notice was ever given them of an intention to make such removal, and that in consequence thereof, when the fence was torn down and removed on each side of the field, the stock running at large went in the field and destroyed nearly the whole crop.

The instructions given by the court, when taken together, do not appear objectionable. The substance of plaintiff's instructions was that before defendant could justify his act it must be shown that there was an order of the County Court establishing the road and directing the defendant to open the same; and that defendant had no legal right to throw down the fences of plaintiffs and expose their growing crops, unless plaintiffs had been duly notified that the road had been established, and had a reasonable time, not to exceed six months, within which to remove their crops, &c.

For the defendant the Court instructed the jury that an order of the County Court directing the road overseer to open any road in his road district, will protect him from an action of trespass and damages instituted by any one through whose land said road may be located, and the jury cannot inquire into the regularity of the County Court's proceedings in locating said road.

And of its own motion the Court declared the law to be, that if the County Court had by an order duly entered of record established the road and directed the defendant as a road overseer to open the same, running through the plaintiff's land, then the verdict should be for the defendant.

These instructions were undoubtedly correct. Where the County Court has jurisdiction of the subject matter of opening roads, its order will generally be a protection to an overseer acting under its command. Previous irregularities can-

not affect the overseer, for it is not his business to examine and inquire to see whether everything has been done in a regular formal manner. (*Butler vs. Barr*, 18 Mo., 357; *Walker vs. Likens*, 24 Mo., 298.)

The instructions given for the defendant, stating that the order of the County Court was a protection for the defendant, are qualified in those given for the plaintiff in the matter of giving reasonable notice to the plaintiffs, to enable them to gather or otherwise protect their crops.

This instruction as to notice we suppose was founded upon the law then in force in regard to establishing and opening public roads, which provides that the County Courts should, at the time of giving judgment for the establishment of a road, specify the time when the possession should be given by the owner, giving the owner of the land a reasonable time, not exceeding six months, to erect fences, if the Commissioners report showed that fencing was required, and also time to gather growing crops, if there were any growing at the time on the premises. (2, W. S., p. 1228, § 54.)

There is nothing in the record to show that the County Court observed this provision of the law. But its failure to comply with the law would not render the defendant liable when it gave judgment when it had acquired jurisdiction over the subject matter, if he proceeded legally. Although the instruction is principally based upon the statute, it recognized and enforces the principle, that before plaintiff's fences could have been legally thrown down and their crop exposed to destruction, it was necessary that they should have been notified in order that they might have taken steps to avoid loss or injury. The spirit of the instruction is that reasonable notice for that purpose should have been given. Whilst an order or judgment of a Court of competent jurisdiction will protect an officer in executing its mandates in a legal and proper way, it will not afford him protection in wantonly and recklessly injuring others. Admit that there was no statute strictly applicable to the subject, still would not the laws imply in such a case, that reasonable notice should be given to a person that he

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might save and protect his property before it should be turned out to be destroyed. Where summary proceedings are had in which the rights of third persons are involved, the law always implies that they shall have reasonable notice to prepare for the protection of their rights. And an officer armed with legal process may execute it in such a manner as to make himself a trespasser. The law is not so unjust as to sanction the acts of the defendant in this case. He proceeded without notifying the plaintiffs, and in their absence, to tear down their fences and let the stock into their field, causing an almost entire destruction of their crop. Had a reasonable notice been given of an intention to open the road, this waste and injury might have been avoided. Before the defendant can be permitted to shield himself behind the order of a court, he must show that in executing its process he acted in a legal and reasonable manner, and was not guilty of oppression or wrong.

The instruction though technically incorrect had no tendency to injure the defendant, and the judgment is evidently for the right party.

We have seen nothing in the matters urged for a new trial which require our interference.

The judgment should be affirmed. All the other Judges concur.

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PRIESTLY GOODWIN, Respondent, vs. THE M., K. & T. R. R. Co., Appellant.

1. Judgment affirmed.

Appeal from Henry County Court of Common Pleas.

W. J. Thornton, for Appellant.

A. Budd, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This suit was originally commenced in a justice's court, where the plaintiff had judgment, from which the defendant

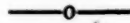
Carson v. Sheldon.

appealed to the Common Pleas, where the plaintiff again received judgment, from which the defendant has appealed to this court.

The suit was founded on account, for one hundred ties at fifty-five cents per tie. The evidence strongly tended to prove the plaintiff's case. The only question raised was, whether the ties were sold to the defendant, or taken without leave. An instruction was given at the instance of the defendant raising this question, and upon the evidence the court found for the plaintiff.

We do not feel at liberty to disturb this finding. Judgment affirmed.

The other judges concur.



THOMAS CARSON, Appellant, *vs.* WM. SHELDON, Respondent.

1. *Jeofails*—*Judgment on proceedings technically defective—Cannot be attacked collaterally.*—In a collateral proceeding a judgment and sale made thereunder, cannot be set aside or avoided for technical errors.

Appeal from Henry Circuit Court.

Wright and Wilson, for Appellant.

McBeth & Price, and Lay & Belch, for Respondent.

ADAMS, Judge, delivered the opinion of the Court.

This was ejectment, and the judgment of the Circuit Court having been rendered against plaintiff he has appealed to this Court.

It is admitted that this plaintiff was the owner of the land at one time. But the defendant claims by a mesne conveyance under a foreclosure sale of a vendor's lien, in a suit brought in the Circuit Court of Henry County by Thomas W. Nelson, against said plaintiff, which resulted in a judgment foreclosing the vendor's lien, and a sheriff's sale and deed on execution issued on that judgment.

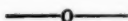
The plaintiff asks us to pronounce the judgment and foreclosure sale void for various reasons growing out of errors in those

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proceedings, such as that the summons did not run in the name of the State, and the Court allowed this to be amended; that the suit commenced in the name of Charles W. Nelson, and the original summons issued in that name. And afterwards the Court permitted the name of the real party, Thomas W. Nelson, to be inserted in the proceedings by way of amendment. Some other similar objections are relied upon as rendering the judgment of foreclosure and sale and deed by the sheriff void.

It is unnecessary for us to decide whether such objections would be sufficient to reverse the judgment of foreclosure on error or other direct proceeding. It is sufficient to say, however, that in a collateral proceeding like this we are not allowed to disturb the foreclosure judgment and sale on account of such alleged errors. The objections are technical rather than substantial, and are not such as to render the foreclosure sale and sheriff's deed void. Judgment affirmed.

Judge Wagner absent. The other Judges concur.



WM. G. BLAKE, Defendant in Error, *vs.* ANDERSON DOWNEY,
Plaintiff in Error.

1. *Bills and notes—Sureties—Action—Merger—Jurisdiction.*—Where a surety on a promissory note has been compelled under a judgment rendered against him to pay the note, his right of action against the maker of the note is on contract as on an implied promise to repay the money, and not on the note itself; that is merged in the judgment. And where the note was for an amount within a justice's jurisdiction, but the judgment was for an amount exceeding his jurisdiction in actions founded on contract, the surety's action was without the jurisdiction of the justice.
2. *Practice, civil—Appeal—Justices' courts—Notice.*—Under the statute regulating appeals from Justices' courts, if the appellant fails to give notice as required, the court at the instance of the appellee is bound, of course, to continue the case.

Error to Cedar County Circuit Court.

Chandler and Butler, for Plaintiff in Error.

EWING, Judge, delivered the opinion of the Court.

This action was brought before a Justice of the Peace on an

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account for money paid by plaintiff as defendant's surety on a note executed by them to one Dale. The account or statement alleges the recovery of a judgment against the plaintiff on the note for a balance due, and payment by him of such balance, being with costs ninety-three and 94-100 dollars. There was a judgment for defendant in the Justice's court, from which plaintiff took an appeal to the circuit court. Defendant Downey appeared for the purpose of moving to dismiss the cause for want of jurisdiction, and filed his motion for this purpose on the ground that the amount claimed was an excess of the jurisdiction of the justice; which being overruled he excepted. The cause was then called for trial, and defendant not consenting to go to trial because no notice of the appeal had been given, judgment was rendered against him by default.

A motion for a new trial assigning as reasons therefor the want of jurisdiction, and the failure of the appellant to give notice of the appeal, the appeal not having been taken on the day the judgment was rendered, was overruled, exceptions saved, and the cause is brought here by writ of error.

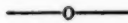
Justices of the Peace and Circuit Courts have concurrent jurisdiction in all actions founded on contract, where the debt or balance due or damages claimed exclusive of interest shall exceed fifty dollars and not exceed ninety dollars, and in all actions on bonds and notes for the payment of any sum exceeding fifty dollars exclusive of interest and not exceeding one hundred and fifty dollars. (2 W. S., 808.) This was not a suit upon the note, for that had been merged in a judgment which had been satisfied by the plaintiff as he alleges; but the cause of action is for money paid as surety of the defendant—the defendant's liability arising from an implied promise to repay it. This action, therefore, comes within the first of the above named classes. I think it sufficiently appears from the statement of the cause of action filed by plaintiff before the justice, and from the note which is referred to in it, as being filed therewith, that the sum sued for, consists of interest to an extent that gave the justice jurisdiction. The appeal not hav-

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ing been taken on the day the judgment of the justice was rendered, and no notice thereof having been given, the cause was not properly for trial.

If the appellant fail to give notice of his appeal, when such notice is required, the cause shall at the option of the appellee be tried at the first term, if he shall enter his appearance on or before the second day thereof, or at his instance shall be continued as a matter of course. (21 W. S., 850, § 22.) The Court had no discretion in the matter, but it was its duty to continue the cause.

The judgment of the Circuit Court is reversed, and the cause remanded. The other judges concur.



NANCY HAMBY and SILAS HAMBY, Defendants in Error, vs.

THOMAS BRASHER, Executor of the last will of AQUILLA BRASHER, deceased, Plaintiff in Error.

1. Judgment affirmed.

Error to Cedar County Circuit Court.

R. F. Buller, for Plaintiff in Error.

J. Bracey, for Defendants in Error.

EWING, Judge, delivered the opinion of the court.

The plaintiff, Nancy Hamby, presented a demand in the Probate Court of Cedar County, for services in taking care of Aquilla Brasher and his wife, for a period of some twenty months. Defendant moved to dismiss the proceeding in the Probate Court, but the motion was overruled. Whereupon leave was given to amend by joining Silas Hamby, the husband, as a party plaintiff. After hearing the testimony, the amount claimed, one hundred dollars, was allowed. An appeal was taken to the Circuit Court, where on a trial by jury, there was a verdict, and judgment for plaintiff for sixty-two and 25-100 dollars. Upon a careful examination of the bill

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of exceptions, we find nothing to warrant us in disturbing the verdict. An instruction given at the instance of the plaintiff is subject to criticism, but we do not think the jury were misled by it to the prejudice of the defendants. The court refused an instruction asked by defendants, to the effect that plaintiffs could not recover for services rendered after the death of Brasher, the husband. This was a correct proposition of law, but the court declared the same thing in effect in an instruction given at the instance of the defendant.

The jury in rendering their verdict evidently took the lowest estimate of the value of the services as testified to by the witnesses. Upon the whole, we think the judgment is for the right party.

The judgment of the Circuit Court is affirmed. The other Judges concur.

—o—

J. W. CLELLAND & Co., Appellant, vs. L. J. SHAW, Respondent.

1. *Practice—Supreme Court—Appeal—Affidavit.*—Where the record fails to show that the appellant has filed the affidavit for an appeal required by the statute, the appeal will be dismissed.

Appeal from Vernon Circuit Court.

Johnson and Wright, for Appellant.

S. A. Wright and Meigs Jackson, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

The defendant raises the objection that the appeal in this case was improperly allowed by the Circuit Court. There was no affidavit made for the appeal as required by law. (See W. S., 1059, § 11.) This section provides that no appeal shall be allowed unless the appellant or his agent shall, during the term, file in the court his affidavit "stating that such appeal is not made for vexation or delay, but because the affiant believes that the appellant is aggrieved by the judgment or decision of the court." As no such affidavit appears in the record, the appeal is ordered to be dismissed.

The other judges concur.

GEO. WILLIAMS Respondent, vs. J. J. PORTER, *et al.*, Appellants.

1. *Mechanics lien—Description of property.*—When a mechanics lien is filed against a building in the country, and the acre of ground on which it is situated, the description must identify that particular acre, or the lien will fail, and the suit as against the owner must be dismissed.
2. *Mechanics lien—Contractor, judgment against—Lien, failure of.*—Where a mechanic makes a personal contract with the contractor to do work on a house, though his lien against the property may fail, yet he can have a personal judgment against the contractor.
3. *Mechanics lien—Issues—Jury—Instructions of Court.*—In a mechanics lien suit, the question whether there is a lien or not, is one of the issues of the case, and must be submitted to the jury; though where there is a defective description of the property, the Court may instruct the jury that there is no lien to enforce.
4. *Contract—Non-compliance—Adjustment—Appropriation and use of work.*—Where a person does not literally comply with his contract, yet if there is a settlement and acknowledgment of indebtedness, that may be a waiver of the necessity of strict compliance, and if the work is appropriated by the other party to his use, the contractor is entitled to what his work is reasonably worth.

Appeal from Johnson Circuit Court.

Hunter, Johnson & Wright, for Appellants.

I. A true description of the property, or so near as to identify the same was not filed with the clerk, nor even stated in the petition. (*Matlack vs. Lare*, 32 Mo., 262.)

II. The petition only prays for a judgment against Porter, and for the amount which is alleged to be due by Porter alone, and for a lien on Gray's house, and one acre, and that without describing the acre; yet the judgment, or rather decree, is jointly against both Porter and Gray—and for the sale of the house and land in the first instance. This judgment as against Gray was without authority by law, and should have been arrested. (2 W. S., 910, § 14.)

III. The court erred in refusing to permit the jury to try the issue of facts as to the lien. (2 W. S., 1040, § 12.)

Birdseye & Wight, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This record seems to present a comedy of errors.

It was an action on an alleged mechanics lien by the plaintiff as sub-contractor under the defendant Porter, for a balance on the plastering of a two story house which Porter had agreed to build for Gray.

The statement filed by the plaintiff, claiming a lien on the property of Gray, contains no such description of the property as the statute requires. The statute, (2 W. S., 909, § 5) provides that there must be a true description of the property, or so near as to identify the same, upon which the lien is intended to apply. The description in this statement is "a two-story frame dwelling house" "on the north-west quarter of the south-east quarter of Section 11, Township 35, Range 31, in the county of Vernon, in the State of Missouri."

● The statute (1 W. S., 907, § 2,) gives a lien on the building and the land on which the same is situated, if in the country, to the extent of one acre, if in town, on the lot on which the building is located. The object in filing the lien, is to give notice what land or property is covered by it. And therefore, the acre of ground must be identified by a true description, or so near a true description as to identify it. There is nothing in this description to show in what part of the land the house in question is located, nor any attempt to describe the acre of land intended to be covered by the lien. There being no proper description, no lien was created. (*Matlack, et al., vs. Lare*, 32 Mo., 262.) As there was no lien to enforce, there could be no cause of action against Gray, and the petition should have been dismissed as to him. Although the suit was for the enforcement of a lien, it was also for the recovery of personal judgment against Porter, with whom plaintiff made his contract to plaster the house, and he may in this proceeding obtain such judgment, if he is entitled to it. (*Patrick vs. Abeles*, 27 Mo., 184.)

After the jury was sworn to try the whole case the court refused to permit them to pass upon the question, "whether there was a lien or not." That was one of the issues that the jury was bound to pass upon, and the court had no right to withdraw it from them. But on the facts proven, the court ought

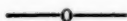
to have instructed the jury that there was no lien to enforce, and that they ought to find for Gray on that issue.

After the jury had found a verdict for the amount claimed by plaintiff, the court rendered a personal judgment against defendants. This was manifestly erroneous; even if there had been a lien no personal judgment should have been given against Gray.

Assuming that the contract with plaintiffs was to furnish materials, and make a first class job of plastering, he would not excuse himself on the ground that he could not find in Vernon county the proper kind of sand, &c. But if there was a settlement and a certain amount acknowledged to be due from Porter, that might be a waiver of his right to insist on a literal compliance with the contract. At all events, if the work, &c., was appropriated to the use of Gray, the plaintiff would be entitled to what it was reasonably worth. Such instructions as do not accord with these rulings are erroneous.

The judgment must be reversed and the cause remanded, and the petition dismissed as to Gray.

Judge Wagner absent; the other Judges concur.



JULIUS WOODFORD, et al., Respondents, vs. ELIZABETH STEPHENS, et al., Appellants.

1. *Husband and Wife—Personal property of wife—Declaration of trust by husband.*—All personal property of wife in possession, whether at the time of marriage or afterwards acquired, vests absolutely in the husband, unless conveyed to him or her for her sole and separate use, and he cannot be declared a trustee for his wife by any loose or general remarks made in conversations. To establish such a trust, the evidence must be clear and unequivocal.
2. *Trusts—Land—Frauds—Statute of.*—When a person buys land with his own money, in order to make him a trustee thereof for any one, such trust under the statute of frauds must be manifested by writing and the evidence must be clear and unequivocal.

Appeal from Johnson Circuit Court.

Johnson & Botsford, for Appellants.

The wife's *choses* or personals in possession, whether owned

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at the time of the marriage or acquired subsequently, pass immediately and absolutely to the husband. (Schoul. Dom. Rel., 112; Matter of Grant, 2 Story C. C. 312; Hyde vs. Stone, 9 Cow., 230; Glann vs. Younglove, 27 Barb., 480; Winslow vs. Crocker, 17 Maine, 29; Morgan vs. Thames Bank, 14 Conn., 99; Legg vs. Legg, 8 Mass., 99; Hawkins vs. Craig, 6 Monr., 257; Shirley vs. Shirley, 9 Paige, 363; Hopkins vs. Carey, 23 Miss., 54; Hopper vs. McWhorter, 18 Ala., 229; Hoskins vs. Miller, 2 Dev., 360; Skillman vs. Skillman, 2 Beasley, 403; Cropsey vs. McKenney, 30 Barb., 47; Gentry vs. McReynolds, 12 Mo., 533; Abbingtion vs. Travis, 15 Mo., 240; Boyce vs. Cayce, 17 Mo., 47; Polk's Admr. vs. Allen, 19 Mo., 467; Walker's Admr. vs. Walker, 25 Mo., 367; Clark vs. The National Bank, &c., 47 Mo., 17; Pawley vs. Vogel, 42 Mo., 291.)

If it is attempted to prove that the husband did not intend to acquire personal property, owned by the wife at the time of marriage or acquired by her descent, gift or otherwise during coverture, by the admissions and declarations of the husband, such admissions and declarations must be shown to have been deliberate, positive, precise, clear and consistent. (Walker's Admr. vs. Walker, 25 Mo., 367; In Re Gray's Estate, 1 Penn. St., 327; Gochenaur's Estate, 23 Penn. St., 460; Johnston vs. Johnston's Admr., 31 Penn. St., 450; Coates vs. Gerlach, 44 Penn. St., 43; Borst vs. Spelman, 4 Comst., 284; Jennings vs. Davis, 31 Conn., 134; Denning vs. Williams, 26 Conn., 226; George vs. Spencer, 2 Md. Ch., 353; Reynolds vs. Lansford, 16 Texas, 286; Gannard vs. Es-lava, 20 Ala., 733; Walter vs. Hodge, 2 Swanston, 97; Schoul. Dom. Rel., 285; Cord. on Married Women, § 593; Clancey on Rights, 259, 260; 2 Sto. Eq. J., § 1375.)

While the case of Tennon, vs. Tennon, (46 Mo., 77,) was decided correctly upon the facts, some portions of the opinion delivered by Judge Currier certainly contain erroneous statements of the law. The closing paragraphs of that opinion assume, that, in order for the husband to acquire the ownership of *choses* in

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possession of his wife, he must reduce them to his own possession with the express intent so to acquire them. This is not the law, as applicable to *choses in possession*, though it may be as to *choses in action*. (Schoul. Dom. Rel., 112 to 117).

When the rights of creditors are not in the way, courts of equity on less proof will compel the execution of the trust for the benefit of the wife. (Walker vs. Walker, 25 Mo., 367; 2 Sto. Eq., §§ 1372, 1373, 1380.)

ADAMS, Judge delivered the opinion of the Court.

This was an action in the nature of a bill in equity to divest out of defendants the title to the north half of the north-east quarter of section 19, township 45 of range 45, in Johnson county, and invest the same in Martha J. Woodford, wife of plaintiff, Julius Woodford.

The petition in substance alleges that the plaintiff, Martha J. Woodford, first married Humphrey J. Marshall, and that after she was married, she received a large amount of personal property from her father, among which was a fine horse, and all of which was held by her for her separate use, and that her late husband sold part of this property with the express agreement that the proceeds of sale were to be invested in lands for her separate use; that he took this money and entered the tract of land in dispute, and made the entry in his own name instead of hers, but that the land was entered for her and with her money, and was always held by him for her.

The defendants by their answer deny all the material allegations of the petition, and allege that the money belonged to Humphrey J. Marshall, her late husband in his own right, with which the land was entered. The defendants also set up as a bar to this suit a former judgment in partition between these same parties, in which part of the lands belonging to her former husband was allotted to the plaintiff as her dower, and the remainder, including the piece in controversy, was sold, and John Price, one of the defendants in this suit, became the purchaser.

The case was submitted to the court for trial, and the court found for the plaintiffs and gave judgment, vesting the title

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to this tract of land in plaintiff, Martha J. Woodford, from which judgment the defendants have appealed to this court.

The evidence upon which this decree is based is preserved in the bill of exceptions, and the facts as developed are as follows:

In the year 1848, the plaintiff, Martha J. Woodford, whose maiden name was Martha J. Shivers, intermarried with Humphrey J. Marshall, in Johnson county, Mo. That at, or just before the marriage, her father had given her a horse and soon afterwards a cow and a heifer, and four or five sheep, and two beds and plenty of bedclothes. Some months after the marriage her husband, Marshall, went to her father's house and brought home the horse, cow, heifer and sheep. That in 1850 or 1851, Marshall sold the horse with another horse to John S. Jones for \$130 for both; that the other horse so sold brought in the sale \$75. The land in dispute was entered by Marshall in his own name in December, 1853. The witnesses on the part of plaintiffs testified in substance that they heard Marshall speak of this land in 1860 or 1861, and that he called it Martha's land, that he had entered it with money he got for the sale of Martha's horse that had been given to her by her father; that when persons wished to buy this piece of land he would say, it is Martha's land, go to her if you want it. Martha testified that she claimed the land as hers; that she claimed it as hers in the presence of her husband, Marshall. The evidence also showed that as long as Marshall had the horse he received from his wife's father he called it Martha's horse.

On the part of the defense it was in evidence by the testimony of John Price and his wife and sister-in-law, all of whom are parties to this suit, that the evening before the land was entered by Marshall, he came to Price's house in a great hurry to borrow the money to make the entry, saying that there was another man wanted the land, and it would ruin him if he did not get it. He wanted land office money, and Price let him have \$100 in gold and silver to enter the land with; that on his return from the land office he said he had ridden all night and made the entry, and as he returned home met the man going to enter the land.

The patent for the land was dated in 1854, and conveyed the land to Marshall, the deceased husband of plaintiff's wife, Martha.

The defendants in this case are the brothers of Humphrey J. Marshall and his sisters and their husbands. Marshall died in 1861, intestate and without any lineal descendants.

The partition suit was brought by the defendants against the plaintiffs, and in that suit the plaintiffs by their answer admitted that Humphrey J. Marshall died seized of this land, and they did not set up in that suit that the plaintiff's wife was the equitable owner of this tract of land; that suit resulted in the allotment of dower to these plaintiffs in a part of the land, but did not include this tract; and this piece, with the remainder of the lands, was sold at partition sale, and the defendant, Price, bought this tract.

The foregoing constitutes all the facts developed by the evidence on both sides.

I am unable to perceive upon what principle the decree of the Circuit Court can be upheld.

It is too well settled to need illustration or citation of authorities that the husband, by marriage, acquires an absolute right to all the personal property in possession belonging to his wife, and that all subsequent acquisitions by his wife of *choses* in possession, vest absolutely in him unless such acquisitions be given or transferred to her or him for her sole and separate use. Where a husband, by means of the marriage, acquires the absolute right to personal property in possession, he can not be declared a trustee for his wife by loose and general remarks made in conversations. To establish such a trust against the husband, the authorities are united that the evidence must be clear and unequivocal. (Clancy 260; *Walter vs. Hodge*, 2 Swanst. 97. *Walker adm'r, vs. Walker*, 25 Mo., 367.) There is not a particle of evidence in this case to show that the small pittance of property received by Marshall, the former husband of plaintiff's wife, was received or held by him for her sole and separate use. His loose declarations in the presence of his wife or others to the effect that this land was

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his wife's, and that the horse he sold was his wife's, and the land was bought with the proceeds of the sale of the horse, are not sufficient to establish a trust in her favor, either in the horse, land or proceeds of the sale of the horse. They are only such remarks as any kind husband must be allowed to make without creating a trust upon his property. (Slocum vs. Marshall, 2 Wash., C. C., 398, 1, John. Ch. 1.)

The declaration of the wife that this land was hers, is no sufficient evidence of a trust. If the money was his with which the land was entered, a trust, in favor of his wife or any one else could only be manifested or proved by writing. Conceding that it might be created by parol, it must under the statute of frauds be manifested by writing. To create a trust whether in regard to real or personal property, the act must be done with that intent, and must be manifested by clear and unequivocal evidence. The loose remark of Judge Currier in *Tennison vs. Tennison*, 46 Mo., 77, to the effect that the husband in receiving personal property coming to him by the marriage is presumed in equity to take it as the separate property of his wife, is unsupported by a single authority so far as I know. It was not necessary to the conclusion arrived at in that case, that he should have made this remark, and the other judges might have concurred in the result without assenting to this *dictum*.

A marriage without anything further, both at law and in equity, transfers to the husband absolutely all her *choses* in possession unimpressed by any trust in her favor, created or manifested by the mere act of reception.

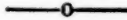
Even if there had been sufficient evidence of a trust in favor of the wife in regard to the horse, etc., received by the husband, the weight of evidence clearly shows that the land was not purchased with the proceeds of the sale of the horse. The facts and circumstances all tend to prove that he borrowed the hundred dollars from Price, with which he entered the land, and afterwards paid Price the amount so borrowed.

There seems to be no possible light in which the facts of this case can be viewed so as to support the decree of the Cir-

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cuit Court. As the decree is not supported by the facts, it is unnecessary to pass upon the effect of the judgment in partition.

The judgment is reversed, and the petition dismissed. The other Judges concur.



WILLIAM BALES, Defendant in Error, vs. BENJ. A. PERRY, et. al.,
Plaintiff in Error.

1. *Mortgages and Deeds of Trust—Power of sale—Trusts and Trustees—Trust power cannot be delegated.*—A special authority must be strictly pursued; and the office and duties of a trustee being matters of confidence cannot be delegated by him to another, unless an express authority to do so be conferred on him by the instrument creating the trust. He is incapacitated from delegating any duty, unless the power is expressly given, which involves the exercise of any discretion or judgment. Mere mechanical or ministerial duties, as, for example, causing advertisements of sale to be put up, proclaiming the sale at auction, and receiving bids, may be done by others. The particular medium of advertisement, the manner of conducting the sale, the best method of offering the property, and the question of postponement of the sale, are matters regarding which, when they are not prescribed by the instrument under which he acts, special trust and confidence are reposed in the trustee; and they cannot be delegated to an agent.
2. *Estoppel—What constitutes—Party setting up must have been misled—Cannot set up when he has some knowledge or means of knowledge—Silence—Fraud—Title—Deed—Record.*—No man can set up another's act or conduct as the ground of an estoppel, unless he has himself been deceived or misled by such act or conduct, nor can he set it up when he knew or had the same means of knowledge of the truth as the other party. Silence only estops when it becomes a fraud. If a man holds title to his lands by deed which has been duly recorded, it is all the notice he is bound to give as long as he remains passive.

Error to Kansas City Court of Common Pleas

Franklin & Napton, for Plaintiffs in Error cited in argument:

(1.) As to exercise of discretion by trustee; McKnight vs. Wimer, 38 Mo., 132; Singleton vs. Scott, 11 Iowa, 589; Pearson vs. Jamison, 1 McLean, 197; Platt vs. McCullough, *Id.*, 69, and cases there cited.

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(2.) As to estoppel, *Lamb vs. Goodwin*, 10 Ired, 320; *Chowning vs. Cox*, 1 Rand., 306; 3 *Leigh*, 654; *Wilburn vs. Spottford*, 4 *Sneed*, 704; *Kellogg vs. Carrico*, 47 Mo., 157; *Jones vs. Moore*, 42 Mo., 413; *Medsker vs. Swaney*, 45 Mo., 273. *Shephard & Slavens*, for Defendant in Error.

The only point we deem it necessary to call the attention of the Court to, is the fact that the evidence shows that the trustee Benjamin Perry was not present at the sale.

At the time of the sale the plaintiff was in Weston, Platte county, Mo., where he resided, and until the trial of this cause had not been in Kansas City for nearly twenty years. *Graham vs. King*, 50 Mo., 22; and authorities there cited.

EWING, Judge, delivered the opinion of the court.

William Bales filed his bill in the Circuit Court of Jackson County, to redeem certain real estate which had been sold under a power of sale in a mortgage deed executed by him to B. W. Perry, one of the defendants, in 1862, to secure a debt of thirteen hundred and eighty-two dollars.

The mortgage contains a clause to the effect that the said Perry, party of the second part, or the Marshall of Kaw township, may sell the property at public vendue for cash at the Court House in Kansas City, first giving twenty days notice of time, terms and place of sale in some newspaper published in that city. The property consisted of some twenty lots in Ransom's Addition to Kansas City, and they were sold for sixteen hundred dollars, some eight hundred dollars less than the amount of the debt including interest.

The bill alleges and the answer admits that one H. B. Bouton acted as the agent of Perry in advertising the property and in conducting the sale, and that Perry was not present at the sale but at his home in Weston, where he had resided many years. The evidence shows that Perry prepared the advertisement and sent it to Bouton, with directions to have it published in a Kansas City paper, but did not name any particular paper; that he gave Bouton no particular directions as to the manner of selling the property, but simply directed

him to sell it and make the money out of it if he could. Charles A. Perry, one of the defendants, purchased the property for himself and his co-defendant, E. H. Perry.

The lots, which were twenty-five feet front, each, were sold two together—the agent and auctioneer deeming this the best mode of making the sale. The evidence was somewhat conflicting as to the value of the property. The witnesses who from their vocation as real estate dealers, would seem to be the most competent judges, estimated it at about twenty-six hundred dollars, but this point is not urged as a ground for the relief sought. The Court rendered a decree allowing plaintiff's to redeem on the grounds, therein stated.

The first and principal question in this case is, whether the power to sell has been well executed. It is a familiar rule of law that a special authority must be strictly pursued, that the office and duties of a trustee being matters of confidence cannot be delegated by him to another, unless an express authority be conferred on him by the instrument creating the trust. (Hill, Trust., 175.) He is incapacitated from delegating any duty, unless the power is expressly given, which involves the exercise of any discretion or judgment. Mere mechanical or ministerial duties, as for example, causing advertisements of sale to be put up, proclaiming the sale at auction, and receiving bids may be done by others. (Powell vs. Tuttle, 3 Com., 396.)

But it is claimed that no *substantial* part of the duties or power of the mortgagee was delegated to the agent Bouton. The rule above stated furnishes the test; and a ready solution of the question is found in the application of this test to the facts of the case. All powers and duties which require the exercise of judgment or discretion are *substantial*, and cannot therefore be entrusted to another. The mortgage, in the present case, prescribed the place and terms of sale, the notice to be given thereof and the medium through which it should be given, *i. e.*, a newspaper; and left all else to the discretion of the trustee himself.

The particular medium of advertisement and the manner of

conducting the sale, are matters upon which the instrument is silent and in reference to which a special trust and confidence are reposed in the trustee; and these are the powers with which the trustee attempted to invest the agent, and which the latter actually exercised. It is manifest that these comprise the principal and most important duties devolving upon the trustee, and if they can be transferred to another, the instrument ceases to be actually the source and measure of the trustee's power and authority. The discretion exercised by the trustee in conducting a sale, involves of course, the consideration by him of everything affecting the interests of the parties to the instrument, and he must not only use good faith, but such a degree of diligence as to bring the property to sale under the best possible circumstances, and such as will promise the best results to those concerned. To this end he must exercise his best judgment as to the proper mode of offering the property for sale, whether in parcels or in a lump; also as to a postponement of the sale under any given state of circumstances, of which he alone is the judge, and in selecting the medium of publication.

Whether, in point of fact, the sale of the property was conducted in all respects judiciously or not, or in a manner most conducive to the interests of those concerned, are questions not involved in this case. This would be a legitimate inquiry in a proceeding to set aside a sale made under the power conferred by the instrument. I am of opinion that Bouton had no power to sell the property, and that such sale passed no title to the purchaser.

See the case of *Graham vs. King*, 50 Mo., 22, in which a sale made under circumstances similar to those in the present case was held void.

The defendants invoke the doctrine of estoppel, and maintain that inasmuch as Bales the mortgagor was present at the sale, and made no objection to it, he is thereby concluded.

The case of *Medsker vs. Swaney, et al.*, 45 Mo., 273, cited in support of this position, does not sustain it. The sale in that case was made by the mortgagee, who had the power to

sell under the mortgage, in person, and the purchase of the property by him was the result of a previous understanding between him and the mortgagor, the latter fully assenting to and confirming all that had been done after the sale was made. The other cases cited by counsel were decided on special grounds which are not applicable to the case at bar.

The Courts all concur in this, that no man can set up another's act or conduct as the ground of an estoppel, unless he has himself been misled or deceived by such act or conduct; nor can he set it up where he knew or had the same means of knowledge as to the truth of the statement as the other party. The primary ground of the doctrine is, that it would be a fraud on a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up. (*Ormsby vs. Ihmsen*, 34 Penn. St., 472; 31 Penn. St., 334; 3 Washburn, 78.)

Though silence in some cases will estop a party from speaking afterwards, yet "it is only when it becomes a fraud that it postpones." If, therefore, the truth be known to both parties, or if they have equal means of knowledge, there can be no estoppel. (31 Penn. St., *supra*.) If a man holds title to his lands by deed which has been duly recorded, it is all the notice he is bound to give so long as he remains passive. (3 Washburn, 75, and authorities there cited.)

Now what are the facts. Bales the mortgagor, was present it is true, at the sale; but it is not pretended that he said or did any thing that misled or deceived the purchaser, or in any manner influenced his conduct. He chose to remain passive and silent. Had he not a right to be so? Was he under any obligation to speak?

That he was not, is clear upon well settled principles, and from the authorities above cited. Perry, the purchaser of the property, was the brother of the mortgagee, was present at the sale, and besides the constructive notice imparted by the record of the mortgage deed, he had actual knowledge for years

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of the existence of the debt and the mortgage, and that Bouton acted for his brother in conducting the sale. He knew or was presumed to know that the deed gave the mortgagee no power to delegate his authority to another. He bought the property with knowledge of the rights and title of Bales, and of the duties of the mortgagee as trustee under the deed.

The decree of the Circuit Court is affirmed. The other judges concur.

—o—

THOMAS C. BOWIE, JR., Plaintiff in Error, vs. THE CITY OF KANSAS, Defendant in Error.

1. *Practice, civil—Judgment—Final, what is—Dismissal.*—Where, after a judgment for plaintiff, a motion in arrest is sustained, and the plaintiff given leave to amend his petition, and upon his refusal to amend, the case is dismissed, the dismissal is such a final judgment as will support an appeal or writ of error.
2. *Statute, construction of—Act incorporating City of Kansas a public act—Judicial notice.*—Under § 12, art. 11, of the act incorporating the City of Kansas, (Sess. acts 1867, p. 18,) which provides that "this act is hereby declared to be a public act, and may be read in evidence in all Courts of law and equity in this State without further proof," it was intended to make that act a public act so that the Courts would take judicial notice of it. When the existence of a corporation is admitted, if a public corporation within the State, and particularly if it is a municipal corporation, the Courts are judicially informed of the laws regulating their organization, rights and duties, just as they are of all other public statutes.
3. *Practice, civil—Pleading—Jeofails—Material averments omitted—Defect cured by verdict.*—If a material matter be not expressly averred in the pleadings but is necessarily implied from what is expressly stated therein, the defect is cured by verdict in favor of the party so pleading, on the presumption that he has proved upon the trial the facts insufficiently averred.
4. *Corporations, municipal—Damages to persons—Insecure streets—Dangerous excavations.*—Municipal corporations are bound to keep their streets and highways in a proper state of repair, and are liable in damages for negligence in suffering their streets to remain in a dangerous condition by which an injury results.

Error to Jackson County Circuit Court.

Franklin and Napton, for Plaintiff in Error.

I. Where a motion in arrest of judgment is sustained and

the judgment arrested it is optional with the plaintiff as to whether he will amend his petition or not, and if he declines doing so the Court may dismiss his petition, and from this judgment of dismissal an appeal or writ of error will lie. (Frazier vs. Roberts, 32 Mo., 459.)

II. The judgment in this case was arrested upon the ground that there was no allegation in the petition charging it to be the duty of the City to keep the sidewalks or streets in repair, or in a safe condition. Such an allegation is not essential to the cause of action, and the petition is sufficient without it.—(Tuttle vs. The City of Topeka, 5 Kansas, 311; Laithe vs. McDonald, 7 Kansas, 254; Mandersheid vs. The City of Dubuque, Law Reg. for Aug. 1871, p. 526.)

III. But if such an allegation was essential or properly among the grounds of the action, still, the defect is cured by the verdict. The liability of the City and its duty to keep the streets and sidewalks in a safe condition is a matter which is *necessarily inferred from the allegations of negligence* in the petition. (Frazier vs. Roberts, 32 Mo., 459; Shaler vs. Van Wormer, 33 Mo., 386; Richardson vs. Farmer, 36 Mo., 41; House vs. Lovell, 45 Mo., 381.)

IV. The Charter of the City, a public act, and of which every Court in the State will take judicial cognizance, gives the corporation *entire* and *exclusive* control of its streets and sidewalks, and so long as any parcel of land is a *street* belonging to a city, and by its charter it is clothed with *exclusive* control of it, just so long it is bound to keep it in a safe condition. The charter of defendant, a public act (Sess. acts, 1868, p. 213,) gives the defendant *exclusive* control of its streets. We hold that in cases of this character against a city incorporated by a public act, it is only necessary for the plaintiff to allege and prove that the injury resulted from a defect, negligently and carelessly permitted, in a street (without fault on his part), and the charter settles the rest. The duty of the city with reference to its streets can only be shown by the charter itself, and the court was bound to take judicial cognizance of it.

V. The motion in arrest pre-supposes and admits that the

verdict is correct. (*Farmers' Bank of Missouri vs. Bayliss*, 41 Mo., 274; *McComas vs. State*, 11 Mo., 116.)

J. B. Turnback, for Defendant in Error.

I. The petition is bad, because it does not disclose any duty owed by the city to Thomas C. Bowie, deceased, respecting the sidewalk on which he traveled, or the excavation into which he fell.

It was essential to aver in the petition, that the opening or excavation was dangerous, so that to render the street reasonably safe for travel a fence should have been put up, a light kept burning, or some other precaution used to warn persons of the danger. It was also essential to show that the city caused the excavation to be made, or had notice of its existence. The city does not insure its streets to be safe for public use, nor against accidents thereon. (*Dill. on Munic. Corp.*, (1st ed.,) p. 753 and following, §§ 789, 790.)

An averment of duty owing, or of the existence of facts out of which the duty arose, is wholly wanting and is fatal. (*Richardson vs. Farmer*, 36 Mo., 45; *Garner vs. McCullough*, 48 Mo., 318; *Moss vs. The Pacific Rail Road*, 49 Mo., 170; *City of Buffalo vs. Holloway*, 7 N. Y., 498.)

II. There is no final judgment in this action, either in substance or form. The petition is simply dismissed, according to the bill of exceptions, or the cause is dismissed, as per record entry.

There is no judgment for costs, nor that plaintiff take nothing by his suit. (*Garesche vs. Emerson*, 31 Mo., 258; *Bogges vs. Cox*, 48 Mo., 278.)

VORIES, Judge, delivered the opinion of the court.

The plaintiff in error brought his suit in the Jackson County Circuit Court on the 21st day of January, 1870. The plaintiff was a minor, and sued by his guardian to recover damages under the third section of the act concerning "Damages and Contributions in actions of Tort," (1 W. S., 519.) The petition upon which the trial was had, charges that the defendant is a municipal corporation within the State of Missouri

Bowie v. Kansas City.

that the plaintiff is a minor under the age of twenty-one years, and that he is the only child of the late Thomas C. Bowie, Senior, and Margaret G. Bowie. "That on the 29th day of March, 1869, his said father, the late Thomas C. Bowie, Senior, was walking along on the sidewalk on one of the principal and most traveled streets, that is Main street, of defendant, (The city of Kansas) and in the evening of said 29th day of March, 1869 after dark, the said Thomas C. Bowie, Senior, when so walking along said sidewalk on said Main street, on the west side of said street, near the junction of said street and Delaware street, and when he, the said Thomas C. Bowie, Senior, was using ordinary care and diligence, fell into an opening or excavation in said sidewalk and was thereby killed; that said opening or excavation in said sidewalk at the time said Thomas C. Bowie so fell into the same and was thereby killed, was negligently and carelessly suffered to be left open and unguarded by the defendant the City of Kansas."

It is then stated that Lewis Saunders is his guardian duly appointed, &c., and that the mother of plaintiff is living and has failed to sue for said wrongful act, within six months following the death of the father of plaintiff as aforesaid, as she might have done by the statutes of this State in such cases provided; that by reason of the death of his said father, he has sustained damages in the sum of five thousand dollars under the statutes of this State in such case made and provided, for which judgment is prayed.

The answer denies that the opening or excavation referred to, was at the time that Bowie was killed negligently and carelessly suffered by the defendant to be left open and unguarded; denies that said Bowie was at the time using ordinary care and diligence while passing along said street in the City of Kansas and at the time said Bowie was killed. But defendant states that on the 29th day of March, aforesaid, the said opening or excavation was well, carefully, and securely guarded by the City of Kansas, and that the said Bowie fell into said excavation wholly by his own negligence and carelessness.

The affirmative matter in the answer was put in issue by a replication.

A trial was had upon the issues made by those pleading, a verdict rendered for the plaintiff for five thousand dollars, upon which judgment was rendered by the court. The defendant filed its several motions for a new trial and in arrest of judgment.

The motion in arrest is stated to be for the reason that the petition does not state facts sufficient to constitute a cause of action, in that it is not shown that defendant is in any manner responsible for the condition of the sidewalk named in the petition, or for the excavation or opening therein.

That said petition does not refer to any act or statute of Missouri whereby defendant was incorporated, and that there is no public act for said purpose.

That the cause is founded on a statute of the State and no reference thereto is made in the petition. This motion in arrest of judgment was by the court sustained. To which ruling of the court, the plaintiff excepted.

The court then notified the plaintiff that leave would be granted to amend his petition. Plaintiff refused to amend his petition, and the cause was dismissed, to which plaintiff again excepted, and has sued out his writ of error and brought the cause to this court.

It appears from the record in this case that the defendant made several objections to parts of the evidence, and that its objections were overruled, and that it also made objection to an instruction given by the court, and that the defendant at the time excepted to the opinion of the court in overruling its several objections. Yet, as the defendant has not brought the case here, and is not complaining of the action of the court, these matters are not here for consideration.

The only questions presented for our consideration by either party are first: whether there is any final judgment in this cause from which an appeal or writ of error will lie;—second; did the Circuit Court of Jackson County err in sustaining the defendant's motion in arrest of the judgment, and in dismissing the plaintiff's cause?

It is urged by the defendant in error, that there is no final

judgment in the cause from which a writ of error will lie.

The entry on the record is as follows :

"Now at this day come the parties aforesaid by Attorneys, and the motion heretofore filed in arrest of judgment in this cause being by consent taken up, and fully heard, is by the court sustained ; to which ruling of the court, plaintiff excepts and at the same time leave is given plaintiff to amend his petition and upon the refusal of plaintiff so to amend his petition, this cause is dismissed to which plaintiff also excepted." The defendant contends that this is no final judgment and to sustain this view, he refers to the case of *Garesche vs. Emerson*, 31 Mo., 258. That was a case in which judgment was arrested and no final judgment had ; but the case was not dismissed by the court. The case of *Boggess vs. Cox*, 48 Mo., 278, is also relied on by the defendant. That case is one in which a plaintiff after his material evidence was rejected by the court, took a non-suit with leave to set the same aside. The motion was afterwards made to set aside the non-suit, which was overruled, and merely a judgment rendered against him for costs. This was held to be no final judgment ; and that a formal judgment should have been rendered for the defendant upon the non-suit. This case carries the rule as far as it is permissible to go ; and although it is a very extreme case, I think it is not exactly in point. In the case under consideration, when the judgment was arrested the plaintiff had a right to stand by his petition, but the court after giving him leave to amend his petition, dismissed the cause. It is true that no final judgment was rendered in form, but the cause was entirely ended and out of court ;—dismissed against the will of the plaintiff, and was a finality so far as the plaintiff was concerned. I think that to hold that this is not a judgment from which an appeal or writ of error will lie, partakes a good deal of mere technicality, and would be looking more to form than substance.

In the bill of exceptions it is stated that the plaintiff's petition was dismissed. We are not to presume that the dismissal was not effectual and final.

The remaining question in this case is, whether the petition

of the plaintiff in the cause was sufficient after verdict, and as a consequence, whether the court that tried the cause, erred in arresting the judgment and dismissing plaintiff's petition and suit. This depends to some extent on the question, whether the law organizing or incorporating the defendant, is a public or private statute, which depends upon the construction of the Act of the Legislature on said subject, approved March 12th, 1867, (Session Acts 1867, p. 18,) and the Act approved March 17th, 1868, amendatory thereof. (Session Acts 1868, p. 208.) By the 12th section of the 11th Article of the first named Act, it is provided as follows: "This act is hereby declared to be a public act, and may be read in evidence in all courts of law and equity in this State, without further proof when specially pleaded." I do not think that this section is to be construed to be a public act only for the purposes of being read in evidence without proof, as provided in the last clauses; in fact, it is difficult to say what was intended by said clause, or what use there was for such clause. The language is, that the act is declared to be a public act, and that it shall be read in evidence, &c.

To my mind, the intention is plain that the Legislature intended to make it a public act, so that the court would take judicial notice of the act, and that it was made so for the convenience of the defendant. When the existence of a corporation is admitted, if a public corporation within the State, and particularly in reference to municipal corporations, the courts are judicially informed of the laws regulating their organization, rights and duties, just as they are of all other public statutes. (Portsmouth Livery Company vs. Watson, 10 Mass., 96.) In the petition in this case, it is charged that the defendant is a municipal corporation, in the State of Missouri. This is admitted by the answer, so that if I am right about the law being a public one, it was unnecessary for the defendant to particularly set forth in his petition, the duties and obligations of the city to keep its streets and sidewalks in repair with greater certainty. The petition in this case was inartificially drawn, and a motion to make it more definite and certain ought

perhaps to have been sustained, if such a motion had been made. And it may be that the petition would have been held bad on demurrer, for it is clear that some of the facts which regularly ought to have been averred, are only to be implied or inferred from averments or statements made. The rule in such case is, that if a matter material to plaintiff's cause of action be not expressly averred in the petition, but the same be necessarily implied from what is expressly stated therein, the defect is cured by verdict. (Shaler vs. Van Wormer, 33 Mo., 386; Frazer vs. Roberts, 32 Mo., 457.) This doctrine is founded upon the presumption that the plaintiff has proved on the trial the facts insufficiently averred. Testing the petition in this case by this rule, we find the charges in the petition are, that the father of plaintiff was walking along the sidewalk, on one of the principal and most traveled streets, that is to say Main street of the defendant, &c., and when so walking along said sidewalk late in the evening, when it was dark, and when he was using ordinary care and diligence, he fell into an opening or excavation in said sidewalk, and was thereby killed. And that said opening or excavation in said sidewalk at the time his said father fell into the same and was killed, was *negligently and carelessly suffered to be left open and unguarded* by the defendant, the City of Kansas.

Now, one can scarcely look at the above statement, without seeing the implication arising from the use of the language; that it was a public street, and sidewalk, and thoroughfare to which the averments refer, and that it was the duty of the defendants to keep it in repair, and guard against the happening of such accidents as befel the plaintiff's father, and that the defendants had negligently failed to perform their duty; which also implies that the defendants had notice of the dangerous condition of the street or sidewalk. If these things are, as I think they are, all implied in the averments in the petition, then it is to be presumed that they were all proved upon the trial, and the petition would in such case, be good after verdict.

It is expressly provided in the act incorporating the defendant, which I think is a public act, "That the city shall have

exclusive control and power over the streets and public grounds of the city, to establish and keep in repair bridges, culverts and sewers, sidewalks and cross-walks, &c., and to abate any obstruction or encroachment thereon, &c. The city is also authorized to levy taxes. I suppose there is no doubt however, as to the liability of the city in such case for negligence in suffering the streets to remain in a dangerous condition by which an injury results. This question is well settled in this State by the cases of *Blake vs. The City of St. Louis*, (40 Mo., 569,) and *Smith vs. The City of St. Joseph*, (45 Mo., 449,) and I think that the allegations in this petition, were sufficient after verdict. In this case, issues were joined between the parties; a trial had, and it does not appear that defendants were surprised on the trial. If they were they had a plain remedy in such case. I think our statute in reference to the amendment of pleadings and proceedings applies. (W. S., 1036.)

I think that with this liberal statute of amendments the court in this case ought not to have sustained the motion to arrest after verdict.

It is also insisted by the defendant, that the statute under which the plaintiff sought to recover damages, was not sufficiently referred to in the petition. It was referred to as the statute in such case made and provided. I think that this was sufficiently certain.

Judge Wagner absent. The other judges concurring, the judgment of the Jackson Circuit Court in arresting the judgment and dismissing the petition and suit is in all things reversed, and the cause remanded to the court from which it came, where judgment is directed to be rendered on the verdict.

JAMES L. GRAY, Respondent, *vs.* ERMINE CASE, JR., Appellant.

1. *Sheriffs' sales—Purchaser, liability of—Contract.*—A. bought property at a sheriffs' sale, but the next morning informed the sheriff that he bought the property as agent for B., when the sheriff entered the name of B. on the sale book as purchaser, with a memorandum of the facts. *Held*, that the contract of sale and purchase was complete when the bid was accepted and entered on the sale book, and A. was liable for the purchase money.

Appeal from Jackson Circuit Court.

Lay, Belch & E. Case Jr., for Appellant.

Warwick Hough, for Respondent.

The contract of sale and purchase was complete, when the property was struck off to appellant and his name was entered in the sale book as purchaser. The sheriff had no power to alter or affect that contract, and the rights of the execution creditors therein, by any subsequent alteration or amendment thereof, made by him.

WAGNER, Judge, delivered the opinion of the court.

This was a motion filed under the statute (1 W. S., 610-11, §§ 46, 47,) by the plaintiff as sheriff of Jackson county, for judgment against the defendant, for the difference in amount of bids at which defendant bought certain property at sheriff's sale, and which he refused to pay for, and what the property brought at a re-sale at the same term.

The testimony in the case shows that the property was sold under several executions, and that the defendant bid it in in his own name, and that the entry was made by the deputy sheriff who conducted the sale accordingly. The purchase money was not paid on that day, and on the next morning, the defendant informed the deputy that he did not bid for himself, but purchased for one Ellwood, and that Ellwood had concluded not to take the property.

The deputy then, the day after the sale, entered the name of Ellwood on the sale book as purchaser, accompanied with a memorandum of the facts; this was the first information that the officer had that defendant was buying for any person other than himself. Defendant was attorney in the executions but

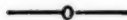
there is no pretense that he was bidding in the property for his clients. Ellwood, whom he claims he bought for, was a stranger to all the proceedings.

I do not think the sheriff could release the defendant from his bids after the property was struck off to him. The contract of sale and purchase was complete when the bids were accepted and entered on the sale book.

The execution creditors then acquired rights which it was not competent for the officer by an alteration to divest.

The judgment in the court below was for the plaintiff. In my opinion, it was right and should be affirmed.

The other judges concur.



THE KANSAS CITY HOTEL Co., Respondent, vs. JOHN S. HARRIS,
Appellant.

1. *Corporations, private—Shares, calls on—Stockholders and directors, liability of—Estoppel.*—Where a person participates in all the proceedings in creating a corporation, and in increasing its stock and making the calls on the stock subscriptions both as stockholders and director, in a suit against him to compel payment of such calls, he is estopped to deny their validity.

Appeal from Jackson Circuit Court.

Tichenor and Warner, for Appellant.

Lay & Belch with Brown & Case, for Respondent.

The appellant having subscribed to the stock of the corporation by its corporate name, and having subscribed ten additional shares after the increase of its capital stock, having voted for the increase and participated in the meeting for the increase, having acted as a director and voted for assessment on the increased stock, and having paid assessments so made after the increase of the capital stock, cannot question the legal existence of the corporation, nor the validity of its acts in increasing its capital stock, nor in making assessments. (Ang. & Ames on Corpor., §§ 636, 518, 519; Ohio

Miss. R. R. Co. vs. McPherson, 35 Mo., 13; Smith vs. Heidecker, 39 Mo., 163; McDermott vs. Donnegan, 44 Mo., 85; Shaeffer vs. Home, Ins. Co., 46 Mo., 248; Price vs. Rock Island R. R. Co., 21 Ills., 73; Anderson vs. New Castle R. R. Co., 12 Ind., 376; Eaton vs. Aspinwall, 19 N. Y., 119; Bank of Tol. vs. International Bank, 21 N. Y., 542.)

ADAMS, Judge, delivered the opinion of the court.

This was an action to recover the last call on the stock subscribed by defendant to the capital stock of plaintiff.

The plaintiff is a private corporation organized under Chap. 69, 1 W. S., 332, for the purpose of erecting and carrying on a hotel in the City of Kansas. The defendant was an original stockholder and corporator and is still one of them.

The capital stock was originally \$40,000 divided into shares of \$100 each. The defendant subscribed for 40 shares or \$4,000, afterwards the directors and stockholders—the defendant acting in both capacities—increased the stock of the Company to \$80,000, and the defendant subscribed for ten additional shares, making the whole amount subscribed by him, fifty shares or \$5,000.

When the first stock was subscribed, ten per centum thereof was paid, which was considered the first call; afterwards and at different times, four other calls were made, all of which were duly paid except the last. This last or fifth call was for twenty per cent. on the stock held by each stockholder, and it is this last call amounting to \$1,000 on stock held by the defendant, that he objects to paying. The evidence clearly showed that the defendant being a stockholder, was also a director in the Company, and as such stockholder and director participated in the proceedings increasing the stock and also in making the several calls.

The case was submitted to the Court by consent, for trial, and the Court found for and gave the judgment for the plaintiff for the amount of the last call and interest thereon, from the time the same was demanded.

The first objection raised by the defendant is, that there were two subscriptions and the petition only counts on one.

This is a mere technicality. The gist of the action is the amount of the call made on all the stock owned by the defendant.

He first subscribed for forty shares, and afterwards he increased this subscription to fifty shares, or which is the same thing, he subscribed for ten additional shares. The two subscriptions taken together, amount to one subscription of fifty shares. By thus subscribing to the capital stock, he became the owner of fifty shares, and became bound to the Company to pay for these fifty shares on calls to be made for that purpose. He participated in making those calls, and each call as understood by all parties, was on the whole stock whether subscribed at one or more times. Viewed in this light, each call constitutes but a single cause of action.

I see no valid objections to the instructions given for plaintiff. They assert in substance the legal axiom, that the defendant having participated in all the proceedings creating the corporation, and in increasing the stock and making the calls both as stockholder and director, he is now estopped from raising any question in this action as to their validity. (See *Ang. & Ames on Corp.*, §§ 636, 518, 519; *Ohio & Miss. R. Co. vs. McPherson*, 35 Mo., 13; *Smith vs. Heidecker*, 39 Mo., 163; *McDermot vs. Donegan*, 44 Mo., 85.)

Judgment affirmed. The other judges concur.

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JOS. M. ROGERS AND JNO. L. PEAK, Plaintiffs in Error *vs.* W.
A. GOSNELL, Defendant in Error.

1. *Practice, civil, Appeal—Judgment, what final.*—A judgment "that defendant go hence and that he recover his costs, etc.," although not very formal or full, is substantially a good final judgment, and will support an appeal.
2. *Practice, civil, Parties—Trustee and beneficiary—Agreement between other parties may be sued on by beneficiary.*—A party for whose use a contract or a stipulation in a contract is made, when this fact appears on the face of the contract, may maintain a suit in his own name on such stipulation, and this rule applies as well to simple contracts as contracts under seal. The party in whose name the contract is made, is declared by our practice act to be a trustee of an express trust, and may sue in his own name; (2 W. S., 1000, § 3,) but this does not bar the beneficiary from doing so; a recovery by either would be a bar to an action by the other.

*Error to Jackson County Circuit Court.**Franklin & Napton, for Plaintiffs in Error.*

I. The ground upon which the demurrer was sustained was that, the contract being a sealed instrument, no action could be maintained upon it by plaintiffs, who were not parties to the contract. The precise question has not yet been decided by this Court, but has only been decided as far as contracts not under seal are concerned. (*Meyer vs. Lowell*, 44 Mo., 328.) (See also *Lawrence vs. Fox*, 20 N. Y., 268; *Farley vs. Cleveland*, 4 Cowen, 432.) The question as to contracts under seal has more recently been decided in New York, and the decisions say, may be considered settled. (*Coster vs. The Mayor of Albany*, 43 New York, 411; *Lawrence vs. Fox*, 20 N. Y., 268; *Secor vs. Lord*, 3 Keyes, 525; *Van Schaick vs. Third Avenue R. R.*, 38 N. Y., 346; *Ricard vs. Sanderson*, 2 Hand, 179. See also *Kimball vs. Noyes, et als.*, 17 Wisconsin, 697; *Carnegie vs. Morrison*, 2 Met., (Mass.) 404.)

II. Where a motion in arrest of judgment is sustained and the judgment arrested, it is optional with the plaintiff as to whether he will amend his petition or not, and if he declines doing so the Court may dismiss his petition, and from this judgment of dismissal an appeal or writ of error will lie; the plaintiff in such case, being entitled to a review of the action of the Circuit Court in sustaining the motion in arrest by the Supreme Court. (*Frazier vs. Roberts*, 32 Mo., 459; *Shaler vs. Van Worner*, 33 Mo., 386; *Richardson vs. Farmer*, 36 Mo., 41; *House vs. Lovell*, 45 Mo., 381.)

Warwick Hough, for Defendant in Error.

I. The judgment in this cause is no final judgment, and the writ of error must, therefore, be dismissed. (*Zahnd vs. Darling*, 48 Mo., 557; *Preston vs. Mo. and Penn. Lead Co.*, *Id.*, 541; *Bogges vs. Cox*, *Id.*, 278.)

II. The sum agreed to be paid by defendants was, as is recited in the contract, due and owing from said Wornall and others to the plaintiffs, and in such case a third party, for whose benefit a promise is made, cannot maintain an action

upon it. (Manny vs. Frasier, 27 Mo., 419; Page vs. Becker, 31 Mo., 466.)

These cases are not overruled, at least not expressly so, by Meyer vs. Lowell, 44 Mo., 328.

III. The promise upon which the plaintiffs seek to recover, is embodied in a contract under seal to which the plaintiffs are not parties, and they cannot, for this reason, maintain any action upon it.

No one but a covenantee can sue on a covenant. The distinction between sealed instruments and simple contracts has not been abolished in this State, and is an important one to be observed. (Robbins vs. Ayres, 10 Mo., 538, 541. See also Dougherty vs. Mathews, 35 Mo., 520; India Rubber Co. vs. Tomlinson, 1 E. D. Smith, 374; Montage vs. Smith, 13 Mass., 404, 405; How vs. How 1 New Hamp., 51; Hinkley vs. Fowler, 15 Maine, 289.)

ADAMS, Judge, delivered the opinion of the court.

On the 18th of June, 1868, the defendants entered into a contract under seal with John B. Wornall and others, for the purchase of a certain tract of land in Jackson county, and agreed therein to pay as part of the purchase money of said land, the sum of one hundred and fifty dollars to the plaintiffs, the said sum of one hundred and fifty dollars being one-half of the commissions due them by said Wornall & Co.

The plaintiff sued the defendant on this sealed contract, and on the stipulation therein to pay them the \$150.00, due them as commissions from the vendors, Wornall and others. The commissions referred to were due them as real estate agents for making the sale of the land.

The stipulation offered as evidence was demurred to and the demurrer sustained, and the plaintiff took a non-suit with leave, &c., and the motion to set aside the non-suit was overruled and a judgment given discharging the defendant and for costs.

This judgment is objected to as not being a final judgment from which a writ of error will lie. The judgment is that the defendant go *hence* and that he recover his costs, &c. It is not

very formal or full but I think it is substantially a good final judgment. The defendant seems to have been discharged from the action and it would be difficult to take any further steps without reversing the judgment.

The main point on the merits is the demurrer to the evidence. It seems to be well established that a party for whose use a contract or a stipulation in a contract is made, may maintain a suit in his own name on such stipulation. (*Bank of Missouri vs. Benoist and Hackney*, 10 Mo., 519; *Robbins vs. Ayres*, 10 Mo., 538; *Myers vs. Lowell*, 44 Mo., 328; *Hanagan vs. Hutchinson*, 47 Mo., 237.)

The old authorities maintain that this can only be done on contracts not under seal. This distinction was noticed by Judge Scott in *Robbins vs. Ayres*, 10 Mo., 538. But that was a suit on a simple contract, and the question was not properly before the court and what he said must be looked upon as *obiter dicta*. By recent decisions in New York, it is laid down that no such distinction exists. (*Van Schaick vs. R. R.*, 38 N. Y., 346; *Ricard vs. Sanderson*, 2 Hand, 179; *Coster vs. The Mayor of Albany*, 43 N. Y., 399; *Lawrence vs. Fox*, 20 N. Y., 268.)

I see no good reason for keeping up this sort of distinction between contracts under seal and not under seal. If the covenant is made for the benefit of a third person, why is he not a party to it so as to maintain an action in his own name?

The party in whose name a contract is made for the benefit of another, is declared by our practice act to be a trustee of an express trust and such trustee may sue in his own name. (*Harney vs. Dutcher*, 15 Mo., 89; *Miles vs. Davis*, 19 Mo., 408; 2 W. S., 1000, § 3.)

It does not follow that because the trustee is allowed to sue in his own name on such a contract, that the beneficiary is precluded from doing so. A recovery by either would be a bar to another action, whether bought by the trustee or beneficiary.

In some classes of trusts, the trustee alone can sue at law but this is not one of that character.

The courts have repeatedly held, that a person for whose benefit a contract is made may sue in his own name, when it appears on the face of the contract that he is the beneficiary. This was the law before our code of practice was adopted and that code allowing a trustee to sue has not altered this rule.

Under this view, the demurrer to the plaintiff's evidence was improperly sustained, and the judgment must be reversed and the cause remanded.

—O—

MARY GILLIS ROGERS AND SOPHIA GILLIS, Appellants, vs. MARY A. TROOST's Admr., Respondent.

1. *Evidence—Reputation of party to suit as to chastity, when may be inquired into—Wills—Undue influence of beneficiary.*—Evidence as to the chastity of a party to the suit is admissible only where there is an issue directly involving the character of the party, or when it is necessary in order to ascertain the amount of damages, or when it is a matter of fact rendered material by preceding evidence. And where it was attempted to set aside a will on the ground of undue influence and control on the part of the beneficiary over the testator, and no issue was made as to the chastity of the devisee, *held* that her chastity was not properly a matter of evidence.
2. *Evidence—Objection, grounds of—What statement sufficient.*—An objection to evidence as incompetent and irrelevant, sufficiently states the grounds of such objection.

Appeal from Jackson Circuit Court.

Merriman, Hough and Cowan, for Appellants.

I. In almost every case like the present, where a will is contested on the ground that it has been procured by fraud and undue influence on the part of the principal devisee, the chief inquiry after ascertaining the character of the testator, is to ascertain the character of the devisee. (*Nussear vs. Arnold*, 13 Serg. & R., 327; *Dietrick vs. Dietrick*, 5 Serg. & R., 208; *Dean vs. Negley*, 41 Penn. St., 312; *State vs. Shields*, 13 Mo., 236; *Day vs. State*, *Id.*, 423.)

II. The objections to the testimony offered were not sufficiently definite. The objections as shown in the record were

that the testimony was incompetent and irrelevant. The objections should be such as will enable the party offering the testimony to obviate them if possible, and no specific objections can be pointed out in this court, that the record shows were not made in the court below.

The objections made as appears by the record, should have been disregarded. (Clark vs. Conway, 23 Mo., 442; Grim vs. Gamache, 25 Mo., 41; Greene vs. Gallagher, 35 Mo., 226; State to the use, etc., vs. King, 44 Mo., 238.)

Black, Hicks and Sheley, for Respondent. *

I. In civil actions the *allegata* must be proved or disproved by particular facts, and not by general reputation. (Potter vs. Webb, *et al.*, 6 Maine, 18; Gutzwiller vs. Lackman, 23 Mo., 172.)

II. The court did not err in rejecting the testimony offered by plaintiffs to prove the reputation of Mary A. Troost for chastity to be bad. (Anderson Exr. vs. Long, 10 Serg. & R., 60; Wright vs. McKee, 37 Verm., 164; Gough vs. St. Johns, 16 Wend., 646.)

III. Putting character in issue is a technical expression, and confined to certain actions, such as criminal conversation and slander. The allegation charging her with undue influence over the mind of the testator in procuring the will was not putting her character in issue. (Anderson's Executor vs. Long, *ubi supra.*)

VORIES, Judge, delivered the opinion of the court.

William Gillis died in Jackson County in July 1869, leaving a will. Plaintiffs are his only children, their mothers being Delaware Indians to whom he is alleged to have been married. Gillis left a large estate of which he by his will only bequeathed plaintiffs ten dollars each, leaving all the remainder of his large estate to Mary A. Troost, his niece, who resided with him at the time of his death, plaintiffs not having resided with him for many years. Mary A. Troost was by the said will of Gillis appointed executrix thereof, and at the November term of the Probate Court of Jackson County she procured

Rogers and Gillis v. Troost's Adm'r.

the will to be probated, and entered on the duties of executrix of said estate. In the month of February, 1870, plaintiffs commenced this suit against the said Mary A. Troost under the provisions of the twenty ninth section of the statute of this State concerning wills, to contest the validity of the will. Since the suit has been pending Mary A. Troost has died, and the present defendants who succeed to her rights in the premises have been made defendants in her place.

The charges in the petition by which it is claimed that the will is invalidated are, "That the will was not executed according to law"—"That said Gillis was not at the time of the execution of the will, of sound and disposing mind and memory and was not capable in law of making a will"—"That for a long time prior to the pretended execution of said instrument purporting to be the will of William Gillis, and up to the time of his death, and especially at the time of the pretended execution of said will, the said William Gillis was under the undue and improper influence of the defendant, Mary A. Troost, and was by reason thereof incapable in law of making a will."

"That said Mary A. Troost sought by her constant and uninterrupted association with and attendance upon the said William Gillis, and by the use of those enticements, allurements and blandishments peculiar to a female, to so work upon and overcome the natural desires and inclinations of the said William Gillis as to induce him, the said William Gillis, to execute said instrument aforesaid, purporting to be the last will and testament of the said William Gillis; and at the time of executing the same, the said William Gillis was under improper restraint and undue influence from the said practices, enticements and allurements of the defendant Mary A. Troost. It is further stated that at the time of the pretended execution of the will, Gillis was about seventy years old—that his old age, declining health, and debility of mind and body wholly incapacitated him to resist the persuasions and deceitful arguments of the said Mary A. Troost, and that she did then and for a long time previously and up to the time of the death of the

said William Gillis, take possession and control of his mind, and poisoned and estranged it to such an extent as to make him disown, forget and leave as castaways the plaintiffs, his only legal offspring, in order and to the intent that she might become the legatee of the whole estate of the said William Gillis." These charges were all specifically denied by the answer.

When the cause was called for trial and a jury impanelled and sworn, this issue was submitted to them for trial.

"Is the paper writing mentioned in the pleading and now here shown to the jury, the last will and testament of William Gillis deceased?"

The evidence produced and given to the jury on the trial by the several parties, as it appears in the record of the case, is quite voluminous, but it is unnecessary to refer to it for the purpose of a proper understanding of the points to be decided by this Court, further than to say that the evidence given tended to prove the issues devolving upon each side of the case.

After evidence had been given to prove the length of time Mrs. Troost had been residing in the house with William Gillis, and the influence that she seemed to have over him, one William Mulkey was introduced by the appellants who testified that he had been acquainted with William Gillis and Mrs. Troost for nearly thirty years, and that they had resided together all of that time; that she managed his household affairs, &c., &c. The witness then stated that he was acquainted with the general reputation of Mary A. Troost for chastity in the community where she resided and had resided for many years. The plaintiff then asked the witness to state, "what was the general reputation of the defendant Mary A. Troost for chastity for years prior to this time in the community where she lived?" To this evidence the defendant objected on the ground that the evidence was irrelevant and incompetent. The Court sustained the objection and excluded the evidence, and the plaintiff excepted. The plaintiff then offered to prove by the witness that he was well acquainted with the reputation of Mary A. Troost for chastity in the community where she had

lived, and that it was not good and had not been for many years. To this evidence the defendant objected for the same reasons above stated. The Court sustained the objection and excluded all evidence of the general reputation of the defendant for chastity, to which ruling of the Court the plaintiff again excepted.

After the evidence was closed, the jury was instructed as to the law by the court, after which they found a verdict that the paper submitted to them was the last will and testament of William Gillis. The court rendered a judgment for the defendant.

No objection was made or exceptions taken by either party to the instructions given by the court.

After the rendition of judgment by the court the plaintiff filed a motion for a new trial. The only ground set up in said motion for a new trial, is the improper exclusion of evidence by the court. This motion being overruled, the plaintiff excepted and appealed to this court.

The only question presented by the record in this case, for the consideration of this court is, whether the court that tried the cause, properly or improperly excluded the evidence offered by the plaintiff to prove the general reputation of Mrs. Troost for chastity. It is contended by the appellant that in almost all cases like this where a will is contested on the ground that it has been procured by fraud and undue influence on the part of the principal devisee, the chief inquiry after ascertaining the character of the testator, is to ascertain the character of the devisee. This may be true to some extent; you may inquire into the relations that the testator and devisee bore to each other, and whether she was of strong will what influence she had over the testator; whether she was in the habit of exercising that influence; and their conduct and relations with each other, &c. But whether you can inquire into her general character for chastity, would depend in each case upon the question whether there was any issue made in the case involving the character of the devisee for chastity. I think that generally such evidence is not admissible.

The rule in such cases is well stated in the case referred to by appellant, of *Nussear vs. Arnold*, (13th Seargt. & R., 327.)

That was a case in which a will was being contested on the ground that it had been procured by fraud and deceit. Evidence was admitted to prove the character of the devisee, but the learned judge who delivered the opinion of the court, stated the principle upon which the evidence was admitted in very clear language as follows: "It is material that before this evidence, it had been sworn by one of the defendant's witnesses that these women had combined to impose on the testator after he had lost the use of his natural faculties, that they kept him in a state of intoxication, and had represented each other as persons of virtue and good character, and urged him to make his will in their favor, in exclusion of his own blood relations, and that the subscribing witnesses to the will had made the same representations. Under these circumstances I have no doubt that the evidence was admissible, because it had a tendency to prove that the testator had been deceived by falsehood. It is not like the usual case of examining into the character of a person, not a witness in the case, which the law will not permit, but an inquiry into a matter of fact rendered material by the preceding evidence." Now if we adopt the rule laid down by the learned judge in that case it will be difficult to find any issue in the pleadings in this cause, or any evidence in the cause which would furnish a foundation upon which such evidence could be admitted. There must be an issue directly involving the general character of the party, or it must be necessary in order to ascertain the amount of damages, in order to the admissibility of such evidence. It is said by Greenleaf, that it is not every allegation of fraud that puts the character in issue.—"This kind of evidence is therefore rejected wherever the general character is involved, by the plea only, and not by the nature of the action. Nor is it received in actions of assault and battery, nor in assumpsit; nor in trespass on the case for malicious prosecution, nor in ejectment to set aside a will for fraud committed by the defendant. (1st Greenl Evid, 85, 55, and authorities there cited.)

I can see nothing either in the nature of, or issues in the case under consideration involving the character for chastity of Mrs. Troost, nor do I find any authority in the books for the admission of such evidence in a case like the one under consideration. I have carefully examined all of the authorities referred to by the appellant, (except the case in 3 Paine, which was not in my reach) and I find nothing in them that, to my mind, would justify the admission of the evidence excluded in this case. In the case of Gutzwiller vs. Lackman, (23 Mo., 168.) the rule is stated to be, that as evidence is to be confined to the points in issue, the character of either party cannot be inquired into in a civil suit, unless it is put in issue by the nature of the proceedings itself.

This I think to be the correct rule, and as there was no such issue involved in the case under consideration, the evidence was properly excluded.

But the appellant contends that the evidence ought not to have been excluded because the defendant did not sufficiently point out the objections to the evidence. The objection was stated to be on the ground that the evidence was irrelevant and incompetent. I think the reasons stated are sufficient. It is well settled by numerous decisions in this state that an objection to evidence should point out the grounds upon which the objection is made. I think this was sufficiently done in the case under consideration; the evidence was excluded because there was no issue in the case involving the general character of the defendant. How could the ground of the objection be more clearly stated, than to state that the evidence was irrelevant and incompetent. I think that the circuit court committed no error in excluding the evidence, and that the judgment ought therefore to be affirmed.

Judge Adams not sitting. The other judges concurring, the judgment of the Circuit Court is affirmed.

Phelps v. Pacific R. R.

JOSIAH PHELPS, Respondent, *vs.* PACIFIC R. R., Appellant.

1. *Roads, public—Changing and vacation of—Court, County—Statutory proceedings.*—Before a public road can be vacated by the opening of a new road, in accordance with the statute for changing and vacating roads, the County Court must be satisfied that the new road is open and in good condition, and must have made an order vacating the old road. (2 W. S., 1229, § 58.)

Appeal from the Jackson Circuit Court.

J. N. Litton, for Appellant.

The sole power of vacation is vested in the County Court (G. S., 1865, ch. 52, especially § 12, 45 Mo., 284); and the only way the court could vacate the road was by a strict compliance with the statute. (*People vs. Highway Comrs.*, 16 Mich., 64; 45 Mo., 284.)

"If upon the report the County Court be satisfied that the public will not be injured by such change, it shall order the same, and upon satisfactory evidence of such road being opened, the court shall make an order vacating the old road." (2 W. S., 1229, § 58.)

J. B. Hovey, for Respondent.

I. The parol evidence of the vacation and non-user of the county road being offered and received without objection, was sufficient to sustain the verdict.

II. The order of the County Court approving the report of the Commissioner, was equivalent to an order vacating the road.

WAGNER, Judge, delivered the opinion of the court.

This was an action commenced by the plaintiff against the defendant under the damage act for killing a cow.

Where the killing took place, the adjoining lands were not fenced, and the question is, whether it was at a public crossing? There was no attempt made to prove actual negligence. It is conceded that within three years, there was a public road at the place where the accident happened, but it is contended that previous thereto it had been vacated and abandoned. In support of this the records of the county court were produced and given in evidence. They showed a report made by the

road commissioners, recommending a change, and an order of the court receiving and approving the report, and ordering that a change be made in this road, and that the same be marked out according to law and put in good repair for public travel.

One witness testified that he had done some work on the new road, and that was all the evidence there was that the road here in controversy had been vacated.

The statutory provision in relation to changing and vacating roads in force, when this proceeding was had, declared that if upon the report of the commissioner the county court should be satisfied that the public would not be injured by the change, it should order the same; and, upon satisfactory evidence of such road being opened, in good condition, the court should make an order vacating so much of the former road as lay between the different points of intersection, etc. (2 W. St., Ed. of 1870, p. 1229, § 58.)

The only order of the court was that the road so changed should be opened according to law, and put in good repair for public travel.

But before the old road could be vacated, it was necessary that the court should be satisfied that the road as changed was opened and in good condition, and then an order for vacating might be made. No such thing was done here. There was no evidence that the new road was ever opened or put in good condition, or that an order was made vacating the old road. In fact, it does not appear that after making the first order the court ever assumed to act further in the matter.

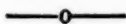
Although travel might have been diverted in a different direction, still if the road was not legally surrendered or vacated, the public might go upon the same, if they pleased, and the defendant had no right to fence it up. (*Indiana Railway vs. Gapen*, 10 Ind., 292; 1 Redf. on Railw., 493, § 15.) That a road might be abandoned, and the public lose the right of traveling on it by non-user, is we think, true, but it would require a longer time than intervened in this case to produce such a result. If, then, the place where the cow was

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killed was a public crossing or highway, the defendant was not liable without proof of actual negligence. (Meyer vs. North Missouri R. R., 35 Mo., 352; Lloyd vs. Pacific R. R., 49 Mo., 199.)

Wherefore the judgment should be reversed and the cause remanded.

The other Judges concurring.



STATE OF MISSOURI, Plaintiff in Error, vs. L. P. CUNNINGHAM,
Defendant in Error.

1. *Practice, criminal—Error, writ of—Appeal—Indictment—Motion to quash.*
—When a motion to quash an indictment is sustained in the lower Court, the State can bring the case to this court by writ of error or appeal. If an appeal is taken, the defendant may be held in custody or required to give bail: if a writ of error be resorted to, he must be discharged, and if the case is reversed and remanded for trial, he may be again arrested on a writ issued for that purpose.
2. *Choses in action—Counties—Bonds, ownership of.*—Bonds of the United States, of countries, &c., are not merely choses in action, but are personal property, and have their *situs* wherever they may be placed for safe keeping, and a county may be the owner or the lawful custodian of them.

Error to Lawrence Circuit Court.

H. Clay Ewing, Attorney General, for Plaintiff in Error

I. The State stands precisely as the defendants, as to its right to bring cases to this court, either by appeal or by writ of error. (State vs. Leapfoot, 19 Mo., 375; State vs. Baker, 19 Mo., 683; State vs. Wishon, 15 Mo., 504.)

Nathan Bray, for Defendant in Error.

ADAMS, Judge, delivered the opinion of the court.

The defendant was indicted for stealing a bond issued by the county of Lawrence for and on account of Pierce Township, of that county, payable to the Northwestern Railroad Company or bearer, at the National Park Bank in the city of New York, which bond is alleged in the indictment to be the property of the county of Lawrence.

The defendant moved to quash the indictment for several reasons, but the only one relied on here, is that the bond was not the property of Lawrence County, as appeared from the face of the bond and indictment. This motion having been sustained by the Circuit Court, the State excepted, and has brought the case here by writ of error.

A motion has been filed to dismiss the writ of error upon the alleged ground that a case of this sort can only be brought here by the State by appeal, and that a writ of error will not lie at the suit of the State. This point was before this Court in the State vs. Newkirk, 49 Mo., 472, and State vs. Peck, *ante* p. 111, 1872, and we held that in this sort of case where there had been no trial and acquittal, the State might bring the case here by writ of error, under § 2, W. S., 1112. The State might also bring the case here by appeal under §§ 13 and 14, 2 W. S., 1114. But these provisions for an appeal do not prohibit a writ of error. The only difference is, that when an appeal is allowed the defendant may be held in custody or required to give bail; but if a writ of error be resorted to, he would be discharged till the case was determined, and if reversed and remanded for a trial, he might again be arrested on a writ issued for that purpose.

The motion to dismiss the writ will be overruled.

The point that the stolen bond was not such property as could be owned by the county of Lawrence, is not tenable. Although it was in reality a township bond; that is the township was the real debtor in this bond, yet the county could become the owner of the bond, and would be the owner as trustee, till the bond was delivered to the railroad company or some purchaser thereof. United States bonds, and county bonds, or township bonds like this, payable to the railroad company or bearer, are personal property, and pass by delivery. They are not simply choses in action, but such property as may be levied on and sold like other personal property under execution, and like other personal property, have their *situs* wherever they may be placed for safe keeping.

The indictment charges that the bond in dispute was the

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property of the county; whether it was so or not would depend upon the facts to be developed in the trial. If the county was the owner in fact, or held it as the lawful custodian for delivery on certain contingencies to the railroad company, then for the purposes of this indictment, the county must be held to be the owner. There is nothing in the doctrines laid down by this court in *State of Missouri, ex rel., N. M. Cent. R. R. Co. vs. Linn County Court*, 44 Mo., 504, which militates against these views.

Let the judgment be reversed and the cause remanded. The other judges concur.

—o—

WILHELMINE REPPSTEIN, Plaintiff in Error, vs. ST. LOUIS MUTUAL INSURANCE COMPANY, Defendant in Error.

1. *Guardians—Appointment, order of—Recital of names of minors.*—In the order of the Probate Court appointing A. the guardian of the minor children of B., it is not necessary to set out the names of the children. Such recital serves only as a means of identification.

Error to Gasconade Circuit Court.

Lay and Belch, for Plaintiff in Error.

Cline, Jameson & Day, for Defendant in Error.

EWING, Judge, delivered the opinion of the court.

This is an action on the life policy of Gottlieb Reppstein, deceased, by the minor children of said Reppstein, by their guardian, the widow of said deceased.

On the trial, the plaintiffs offered to read in evidence the record of the Probate County of Gasconade County appointing Wilhelmine Reppstein guardian of the persons and curatrix of the estate of said minors, and also offered in evidence the bond of said Wilhelmina as such guardian.

The evidence was objected to by the defendant, and excluded by the court, on the ground that the record was not competent proof of the appointment of said Wilhelmine and that the bond was no part of the record.

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Plaintiff thereupon took a non-suit, a motion to set aside which being overruled, they excepted and bring the cause here by writ of error. The defect in the record, which it is claimed renders it inadmissible as evidence of the appointment, is the omission of the names of the minor children. They are referred to as the "minor heirs," of Gottlieb Reppstein, with the further recital in the order that her bond in a sum named with certain persons as sureties, giving, their names, "is by the court examined and approved." The bond, which appears to have been approved the same day, sets forth the names of the minors, and refers in appropriate terms to the order of appointment, and the bond seems to have been duly recorded.

It is probable that such orders usually contain the names of the wards, but is this essential to the validity of the appointment?

The only purpose it answers, is the means of identification, and if this object can be attained, though not so readily perhaps, by a more general description, this particularity becomes unessential, and a reference to the minors by name may be dispensed with. The terms of the order are sufficiently definite for this purpose.

There can be no difficulty in identifying the "minor heirs," mentioned in the order as the minor children of the deceased for whom the guardian was appointed. Moreover, the bond of the guardian, the approval which is recited in the order making the appointment, sets out the names of all the minor children.

The evidence was improperly excluded.

The judgment of the Circuit Court is reversed and the cause remanded. The other Judges concur.

END OF JANUARY TERM 1873 AT JEFFERSON CITY.